SUPREME COURT, U. S.
MAY 4 1972

IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1431

HARVEST BRAND, INC., (Now by Substitution
HARVEST INDUSTRIES, INC.),
Petitioner,

v.

A. E. STALEY MANUFACTURING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Tenth Circuit

EDMUND C. ROGERS
7733 Forsyth Boulevard
Clayton, Missouri 63105
Attorney for Petitioner

Of Counsel
FRED MITCHELSON
301 National Bank Building
Pittsburg, Kansas 66762
JOHN M. HOWELL
7733 Forsyth Boulevard
Clayton, Missouri 63105

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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**To the United States Court of Appeals
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Harvest Brand, Inc., your petitioner, and defendant-appellee below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on December 2, 1971.

OPINIONS BELOW

The District Court opinion holding Respondent's patent invalid (App. p. A-1) was not published. The Tenth Circuit Opinion reversing the trial court (one judge dissenting), entered December 2, 1971, appears in Appendix page A-19, at 452 F.2d 735, and at 171 USPQ 795. A motion was granted December 16, 1971, to extend the time to December 30, 1971, for filing a Petition for Rehearing. The Pe-

tition for rehearing, filed December 29, 1971 (App. p. A-34) was denied February 4, 1972.

Jurisdiction in this court derives from 28 USC 1254(1). Jurisdiction of the District Court rests on 28 USC 1338(a).

QUESTIONS PRESENTED FOR REVIEW

Did not the two judges of the Court of Appeals (one judge dissenting) improperly reverse the district court and improperly hold valid the Staley patent on a trivial change in the recipe for a feed block for stock, all ingredients of which recipe had previously been used in feed blocks for the same purposes, thereby levying tribute from the defendant, potentially from other feed producers, from stock farmers, and ultimately increasing the price of meat:

> Especially as the appellate court undertook an independent examination of the recorded evidence and made its own "findings of fact" without the benefit of observing the witnesses, abruptly reversing findings of fact of the trial court, in a technical patent case that took a week to try with testimony of seven witnesses and a large number of exhibits,
>
> And especially as the "findings" of the appellate court were clearly contrary to the evidence, and indeed were simply not true,
>
> And especially as under the new appellate rules, as appellee-petitioner was not permitted the time of argument nor the length of brief both (1) to support the findings of the trial court and (2) to explain the multitude of erroneous statements in the brief of appellant (here respondent) necessarily posing a dilemma in which Petitioner, having to choose, elected to support the findings of the trial court, inevitably leaving many of the misstatements of the appellant's brief not specifically answered.

STATUTES INVOLVED.

35 USC 282: "* * * the following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded: * * * (2) Invalidity of the patent or any claim in suit on any grounds specified in part II of this title as a condition for patentability * * *."

35 USC 102: "A person shall be entitled to a patent unless—(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, * * *".

35 U.S.C. 103: "* * * A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

STATEMENT OF FACTS

The patent claims a recipe for cattle feed blocks which are an old form of cattle feed. The recipe here consists essentially of dehydrated molasses, salt in sufficient quantity to control consumption, and a binder. Dependent claims include the addition of the drug phenothiazine to the block. Another claim involves simply putting such a

block in the field for cattle to eat, this latter being what the farmer does.

According to the patent the block for the patent may contain other materials such as protein feed and the like, so long as the amount of molasses exceeds a so-called "fifty percent molasses equivalent." No particular meaning was attached to this percentage.

Dehydrated molasses blocks of over 50% molasses equivalent were old, with and without phenothiazine. Using salt to control consumption of molasses was old. Incorporating salt to control consumption in protein feed blocks was old, with and without phenothiazine. The patentee's advertising stated that the patentee had derived the idea of using salt to control the consumption of the molasses block from the former practice in the art of using salt to control consumption of protein blocks. Incorporating salt to control consumption in a block containing molasses and protein, was old in the Arizona paper, this being the same combination as appears in the patent claims save only that in the Arizona cube the protein content was larger and the molasses content was smaller than the amount specified in the patent. The only claim of novelty thereover resided in the designation in plaintiff's recipe that the amount of molasses be in at least fifty percent molasses equivalent.

With the foregoing, the trial court, after a week's trial and full briefing by both parties, held claims 1-9 of the patent invalid, it being held obvious and unpatentable under 35 USC 103, to make a high-molasses, low-protein block with salt to control consumption instead of a low-molasses, high-protein block also with salt to control consumption, with or without phenothiazine. It held claim 1 of the patent anticipated, which purported to patent the method of blocking the product, which was simply the old

method of putting the ingredients in a blocking machine and compressing them into the shape of a block.

It held claim 11, for a method of feeding the blocks to cattle which would render farmers infringers, to be directly anticipated under 35 USC 102, since the method steps were identical to the usual practice of feeding feed blocks to stock by putting the blocks in the field where the stock could get to them.

The Court of Appeals reviewed the facts de novo, and over the dissent of one judge, held to the contrary, as if the District Court opinion had not existed. As we shall show hereafter, the Court of Appeals set forth as a basis for its opinion certain things said by it to be facts disregarded by the trial court **which actually were not true facts at all.**

REASONS FOR GRANTING THE WRIT

We do not ask this court simply to reverse an ordinary law suit. The case involves a broader problem rendered acute by the new appellate court rules.

The recently promulgated rules of appellate procedure limit the brief of an appellee to fifty pages and his argument to thirty minutes (RAP 28(g), 34(b)). For over twenty years FRCP 52 (a) had said "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." And for an equal length of time this had been disregarded too frequently by appellate courts. But when the new short appeal briefs and arguments were insisted upon by the 1968 appellate rules, it became virtually necessary that findings of fact be upheld for the simple reason that the parties are not allowed time or space to present all of the

evidence and background to every fact, and to recreate in the Court of Appeals the climate out of which these findings had emerged in the trial court. **No adequate day in court can now be had on a full set of findings of fact considered de novo in an appellate court.**

This very situation existed here. The trial court did make extensive findings and did reject arguments, did specify witnesses whom he credited over other witnesses. When respondent here, appellant there, filed its brief on appeal, it disregarded the record and the evidence and made a multitude of statements which, to say the least, were inaccurate. The Court of Appeals believed the appellant instead of the trial court, and wrote an opinion not only disregarding the trial court's findings of fact, but making its own "findings" **which are just not true.**

This was a technical case which took a week to try, and the findings were extensive. Because of the limitation of time and space under the new appellate rules, we, as appellee, were confronted in preparing our brief on appeal with the choice between, on the one hand, supporting the findings of fact of the trial court, and, on the other hand, demonstrating the error in the multitude of statements in the appellant's brief. Perhaps naively we relied on FRCP 52(a), believing that if the findings of the trial court were shown to be supported by proper evidence, they would be followed in the Court of Appeals, and that it should not be essential to attack each of the large number of factual errors in the statements in the appellant's brief. Certainly the new appellate rules afford neither time nor space to point them all out.

There is, therefore, serious need to have reliable guidelines for this kind of situation. How should an appellee present his argument? Can he really rely upon Rule 52(a), and argue the findings are supported by the abundance of evidence? Or is he faced with the hazard that find-

ings of fact may be as casually disregarded as they were in this case and rewritten by the Court of Appeals. District Court judges are asking why, in a case likely to go to appeal as do most patent cases, they should even bother to gestate and deliver findings of fact. If findings may be so cavalierly disregarded, the fifty-page, thirty-minute rule simply denies justice, because it denies all possibility of a complete consideration of the issues.

We can illustrate briefly some of the factual errors in the appeal decision. These are for illustration, as more are set forth in the Petition for Rehearing and Supplement thereto in the Appendix (App. pp. A-34 through A-58).

The court of appeals indicated that there was great weight of evidence reflecting "failures and drawbacks of the prior art in accomplishing the novel result achieved through the Staley patent". This argument of the patentee had been made and rejected below. It is contrary to the facts.

To illustrate, the Court said, "Protein and mineral blocks were designed to fill a particular need not necessarily connected with the functions of a molasses salt block. As a carrier of medicines they were failures because they were not palatable enough to cattle to hide the taste of the medicines and their consumption was too variable." This precise argument was rejected by the trial court, because it is untrue. Protein blocks are **still being sold**, still contain medicines and still have salt to control the consumption thereof. And the Staley Company advertised that salt was used **successfully** to control consumption of protein blocks, and that its use to control consumption of molasses blocks was derived from the use of salt to control consumption of protein blocks. Respondent Staley's molasses block advertisement said (App. II, 69):

"Extensive feeding tests showed that this product is so highly palatable that it is necessary to add salt as an aid in regulating consumption at the proper low, optimum rate. High levels of salt (as high as 33%) are being used successfully and economically in controlling the consumption rate of protein blocks under many feeding conditions. Now, the concept of using salt has been extended to controlling of a high level molasses block."

Furthermore, the molasses block of the patent does not control consumption of the medicines, in any different degree from other blocks. True, the plaintiff so alleged and the Court of Appeals accepted as true, **although the trial court rejected this very same argument as untrue.** Other "findings" of the Court of Appeals to the effect that there were failures in the prior art, are equally contrary to the evidence, and to the findings of the district court.

The Court of Appeals "found" that "the evidence proves that cattle develop a tolerance for salt which they like. This can eventually lead to salt poisoning." This is contrary to the very documents that plaintiff relied on in urging the point, and was specifically rejected by the trial court.

The Court of Appeals "found" that Harvest Brand's history belied its statement that the prior art taught one to mix molasses, salt and oil, saying that Harvest Brand had made 100 blocks in 1958, claiming them successful, yet later made blocks of an infringing type (the only difference was the presence of salt in the later blocks).

This kind of distortion of fact by an appellate court is very frustrating. The 100 blocks of 1958 were mentioned during testimony at the trial only to show that blocking dehydrated molasses had been successfully performed in 1958, several years ahead of Staley's patent. The episode

was this: a customer sent Harvest Brand dehydrated molasses to see if Harvest Brand could block it. Harvest Brand blocked it successfully and sent the blocks back to the customer. That is all. It is very dangerous for an appellate court to make findings of fact because that court cannot perceive their context, meaning, or relative weight.

The trial court expressly accepted the testimony of defendant's expert Burns over that of plaintiff's expert Bartley. The Court of Appeals astonishingly reversed on this expressed issue of credibility. How can one create the conditions of credibility of one witness and lack of credibility of the other in the Court of Appeals? It certainly cannot be done in thirty minutes and fifty pages.

As for the technical problems involved, the Court of Appeals said that Staley's expert (whom the trial court had rejected) "and a Harvest Brand witness opined, one would expect serious weathering problems in a block containing salt and molasses. Another witness for Harvest Brand stated that since salt and molasses have different characteristics, one would expect problems during the blocking process." The truth is that there never were any problems in blocking the molasses blocks with salt, and there was **no such testimony** by any witness for Harvest Brand.

Contrary to the "finding" of the court of appeals, blocking the molasses blocks not only presented no problem, but was not originated by Staley. Staley itself had simply sent its mixture down to a professional blocker, and actually knew nothing about the blocking other than the fact that the blocker sent the product back duly blocked. Harvest Brand never had any trouble blocking these materials. The Court of Appeals has confused the record because Harvest Brand's blocker was at one time asked to block dehydrated molasses without any binder. This could not be done, so he did what he always did with

blocking materials. He added a conventional binder and the blocking was thereupon done with no trouble. The trial court heard the testimony and understood this. In fifty pages and thirty minutes there is no chance of explaining factual details like that so that the Court of Appeals can avoid mistaking them.

It is not necessary to multiply the disturbingly long list of erroneous statements in the Court of Appeals opinion. The very basis of facts upon which that court based its reversal of the trial court was untrue. The erroneous "findings" of the appellate court point up very graphically the reason for the rule that Findings of Fact should be secure against such complete disregard by the Court of Appeals.

There is a crying need for some guidelines for patent cases in connection with the stability of findings of fact. At least let us get rid of the trap for the unwary litigant who happens to have believed Federal Rule 52(a) and happens to have believed that the short-shift justice to be produced under the fifty-page, thirty-minute rule in appellate courts, necessarily intended to emphasize Rule 52(a).

It is possible to limit appellate courts to specific legal issues or even an occasional finding of fact which is clearly erroneous. But to upset a whole decision, completely rewriting the findings of fact, completely throwing out all of the findings by the trial court, and rendering its laborious decision a work of sheer futility and a total waste of time, should not be sanctioned if Rule 52(a) and if the fifty-page, thirty-minute rules are to have any meaning. Certainly otherwise justice is impossible.

In addition to the interest of all litigants and courts in stability of the rules of procedure, there is here also the ever-present public interest in a patent adjudicated valid. In this case, public interest is simply in the price of meat

and milk. With farm labor at a premium and costly, farmers have tended to go to the self-feeding of animals, an art which has been developing in the past twenty years. The Staley company, which makes molasses, now can monopolize its use in high-molasses blocks with salt added for self-feeding control. This, we submit, should not be permitted on a patent that differs from the prior art only in the adjustment of the proportions of ingredients in the food recipe for the blocks, which produces no function not known in the prior art.

One other point, which is a corollary to the above, is the need for further guidelines in patent cases involving 35 USC 103. The first guidelines were promulgated by the Court in **Graham v. Deere**, 383 US 1, wherein it was stated that the trial court should find, among other things, the "differences between the prior art and the claims at issue." In the present case, therefore, we forthrightly asserted to the courts below that the particular proportions of ingredients of the recipe in the claims in suit were not shown by any specific item of the prior art, although they were shown in comparable contexts. Such candor may be a mistake, unless this court will declare clearly to the lower courts that by following the instruction of **Graham v. Deere**, a litigant does not admit patentability by admitting novelty. The quoted phrase from **Graham** theoretically requires the litigant to state, as an issue, what is assertedly different from and was disclosed in prior art, so that the court interpreting 35 USC 103 can deal specifically with whether or not that difference is patentable. But there is now great danger in a defendant's being thus forthright, for in admitting that there are "differences between the subject matter sought to be patented and the prior art," the defendant opens the possibility that the court will equate the admission of novelty with a quasi confession of patentability. This Court needs to instruct lower courts that the admission of

novelty, required by this court in **Graham**, is inevitable in a Section 103 defense, and **must not be equated with any confession of patentability**. Otherwise, no attorney can afford to be so candid as to admit novelty, but must perform the usual obfuscation to avoid suggesting to the court a path toward a holding of validity.

This unfortunate situation can be overcome by some very clear instructions from this court on the subject, explaining why the concession of novelty, pursuant to **Graham v. Deere**, must not be taken as a concession of patentability.

For these reasons, we believe that the Petition should here be granted.

Respectfully submitted

EDMUND C. ROGERS
Suite 2162, 7733 Forsyth Boulevard
Clayton, Missouri 63105
Attorney for Petitioner

Of Counsel:

FRED MITCHELSON
301 National Bank Building
Pittsburg, Kansas 66762

JOHN M. HOWELL
Suite 2162, 7733 Forsyth Boulevard
Clayton, Missouri 63105

May 1, 1972

APPENDIX A

Opinion Below of the District Court

In the United States District Court
for the District of Kansas

A. E. Staley Manufacturing Company, a Corporation of Delaware, Plaintiff, vs. Harvest Brand, Inc., d/b/a Stockade Products, a Corporation of Kansas, Defendant.	Civil Action No. KC-2588

Decision of the Court

(Filed October 13, 1970)

Findings of Fact

1. Plaintiff is A. E. Staley Manufacturing Company, a Delaware corporation, with its principal place of business in Decatur, Illinois. Defendant is Harvest Brand, Inc., d/b/a Stockade Products, with its principal place of business in Pittsburg, Kansas.

2. Pursuant to 28 U.S.C.A. §1338, this Court is vested with jurisdiction over the subject matter and the parties to this action.

3. This action involves United States Letters Patent No. 3,246,336, which was issued April 12, 1966, upon the application of Lester Baribo, Marvin W. Porter, Almerin W. Turner, and Kenneth N. Wright, said application having been filed on April 8, 1963. This patent will herein-

after be referred to as the "Staley patent," in that it was assigned by the applicants to the plaintiff, and has been owned by the plaintiff since its issuance.

4. The patent in issue is directed to a feed block composition and is entitled "Molasses Feed Blocks and Method of Preparation and Use" (Plf. Ex. 2).

5. More specifically, the contested patent has eleven claims of which claims 1-3 and 5-11 are in dispute. These claims not only specify variations on a recipe for an animal feed block, but also prescribe a method of making the block and of feeding the block. The precise claims with which this action is concerned are:

> "1. An animal feed block characterized by its resistance to weathering comprising from about 5 to about 40% sodium chloride by weight, based on the weight of the block, and dehydrated molasses, the whole being bonded by a wet binder, the equivalent amount of molasses in the block being not less than 50%.
>
> "2. An animal feed block characterized by its resistance to weathering comprising from about 5 to about 40% by weight sodium chloride, from about 1 to about 4% by weight of a material selected from the group consisting of edible mineral oil and edible fat, the weights based on the weight of the block, and dehydrated molasses, the whole being bonded by a wet binder, the equivalent amount of molasses in the block being not less than 50%.
>
> "3. The article of claim 2 wherein the wet binder is wet molasses.
>
> . . .
>
> "5. The article of claim 2 wherein the amount of salt ranges from about 5 to about 20%.

"6. An animal feed in block form characterized by its resistance to weathering comprising from about 15 to about 23% by weight sodium chloride, from about 70 to about 77% by weight dehydrated molasses, the said dehydrated molasses having a molasses equivalent ranging from about 85 to about 90%, and from about 1 to about 4% by weight edible fat, the whole being bonded by from about 5 to about 12% by weight of a wet binder, all weight being based on the weight of the block.

"7. The article of claim 6 wherein the amount of wet binder ranges from about 7 to about 9%.

"8. The article of claim 7 wherein the wet binder is wet molasses.

"9. A palatable animal feed block characterized by its resistance to weathering comprising from about 5 to about 40% by weight sodium chloride, from about 1 to about 4% by weight of a material selected from the group consisting of edible mineral oil and edible fat, dehydrated molasses and a horn fly controlling amount of phenothiazine, the whole being bonded by a wet binder, the equivalent amount of molasses in the block being not less than 50%.

"10. A method for preparing an animal feed having a molasses equivalent of not less than 50% and characterized by its resistance to weathering which comprises compressing in block form a mixture of molasses in a concentration sufficient to provide a molasses equivalent of not less than 50% comprising dehydrated molasses, from about 5 to about 40% by weight sodium chloride, from about 5 to about 12% by weight of a wet binder to form a block, all of said weight being based on the weight of the block.

"11. A method for controlling the consumption of molasses in cattle to a level not in excess of one

pound per day which comprises feeding cattle an animal feed block comprising from about 5 to about 40% by weight sodium chloride and dehydrated molasses, bonded by a wet binder, the equivalent amount of molasses in the block being not less than 50%."

6. The foregoing claims reveal a total of six ingredients: sodium chloride; dehydrated molasses; mineral oil; edible fat; wet molasses; and phenothiazine. None of these ingredients were, in fact, invented by Staley, and all of them were known in the prior art. (Tr. 742; Def. Ex. M-Doc. C, G, L, R, S, T, U; Tr. 412-20; 442-50.)

7. Poloxalene, a bloat-control drug, is not disclosed in the Staley patent. (Tr. 986-87.) While the specification of the Staley patent does reveal a constituent called dimethylpolysiloxene, it is not synonymous with poloxalene, nor is it presently considered an anti-bloat drug. (Tr. 987)

8. The United States Patent Office considered three previous patents before issuing the Staley patent. These were the Schreiber patent, No. 1,638,963; a Canadian patent, No. 624,812; and a British patent, No. 297,235. (Plf. Ex. 2; Def. Ex. M—Doc. W, W, Y.)

9. At trial, the defendant introduced into evidence sixteen other previous patents and two other publications. (Def. Ex. M.) Plaintiff introduced into evidence five additional patents and two additional publications. (Plf. Ex. 50-54; Plf. Ex. 44, 47.)

10. The concept of animal feed in the form of a block is old in the prior art. This is clearly evident from Knapheide patent, No. 2,124,950, and an Australian patent, No. 205,187. (Def. Ex. M—Doc. S, T; Plf. Ex. 2.) Block-making equipment was also known in the prior art. (Def. Ex. M—Doc. Z; Plf. Ex. 2.)

11. Both the prior art and evidence adduced at trial reveal that molasses is a valuable animal feed in that it is highly palatable, has a large amount of fermentable carbohydrates which provide a ready energy source, and contains trace minerals such as iron and potassium. It is particularly valuable in ruminants such as cattle because it aids in their digestion of roughage. (Tr. 190-196; Def. Ex. M—Doc. C, G.)

12. Conversely, the prior art and evidence also show that molasses presents many problems in that it is difficult to transport, store, handle and feed. It is sticky at normal temperatures, viscous at lower temperatures, and is hygroscopic, i.e., tending to absorb and retain moisture. Further, molasses, if over-consumed by ruminants, is detrimental to the digestive process. (Tr. 190-196; 268; Def. Ex. M—Doc. F, G, M, S, T.)

13. The three ingredients called for by claim 1 of the Staley patent are dehydrated molasses, a wet binder, and 5 to 40% sodium chloride. The claim also states that the equivalent amount of molasses is not less than 50%.

14. Dehydrated molasses is a carrier plus wet molasses that have been mixed and dried. Dehydrated molasses is old in the prior art. (Tr. 83, 742; Def. Ex. M—Doc. B, D, E, F, G.)

15. Several prior art items reveal animal feed which contained a high proportion of molasses. For example, Svenska patent, No. 521,332, discloses that "molasses is mixed with artificially dried hay meal substantially in a proportion of at least 53 parts by weight of molasses to 47 parts by weight of hay meal . . . It is possible to go as far as to about 75 to 80 parts by weight of molasses and 25 to 20 parts by weight of hay meal . . ." (Def. Ex. M—Doc. G.)

16. Other prior art items which disclose animal feed containing high proportions of molasses are Hughes, No. 24,113 and Kupfer, No. 28,703. (Def. Ex. M—Doc. E, R.)

17. The use of a wet binder, and particularly molasses, is also disclosed in the prior art. Such may be found in these patents: Gunesch, No. 3498, and Knapheide, No. 2,124,950. (Def. Ex. M—Doc. Q, S.)

18. Evidence adduced at trial also revealed that wet molasses is, and was previous to the Staley patent, a common wet binder in the industry. (Tr. 218-219, 247, 414, 513.)

19. Sodium chloride, otherwise known as ordinary salt, was included in the blocks of the Staley patent for the purpose of controlling consumption of the blocks. (Plf. Ex. 2.)

20. In 1957 the defendant registered one of its products, a protein block, with the State of Kansas. That block contained no more than 13% salt for the following purpose, as was stated on the block's label:

> "The consumption of Stockade Protein Supplement Blocks is controlled primarily by the amount of salt contained in the block. This gives the advantages of daily feeding without the necessity of daily attention. It will probably be necessary to replace blocks about every ten days." (Def. Ex. G, H.)

21. A similar block of the defendant, containing salt for the identical reason as outlined in Finding 20, was also registered in Oklahoma in 1957. (Def. Ex. I, J.)

22. In plaintiff's advertising of its "Sweetlix" blocks, the following statements were made:

> "Consumption rate is steady, low, efficient . . . because it is controlled by salt. This has been an effective

type of control in protein blocks for many years." (Def. Ex. M-Doc. O.)

and

"High levels of salt (as high as 33%) are being used successfully and economically in controlling the consumption rate of protein blocks under many feeding conditions. Now, the concept of using salt has been extended to controlling of a high level molasses block." (Def. Ex. M-Doc. P.).

23. This evidence, when put in juxtaposition with the statement of the witness-patentee Porter to the effect that the idea of salt "evolved" out of joint discussions which the four patentees conducted, severely diminishes the credibility of Porter and, furthermore, in view of this, the Court is reasonably convinced of the accuracy of the defendant's contention that the addition of salt to control consumption was old and had been taught in the prior art. (Tr. 103.)

24. The concept of salt as a controlling constituent in an animal's diet in order to obtain fairly constant daily rations of other diet supplements is revealed in the Dunn patent, No. 2,489,758. (Def. Ex. M-Doc. L.)

25. The concept of salt in high concentrations as an ingredient in range supplemental feeds such as protein, and thereby regulating intake and making self-feeding possible, was revealed in an article published by the University of Arizona in 1951, and in another article appearing in the **Salt Digest** in 1956. (Def. Ex. M-Doc. M, N.)

26. Elsewhere in the record there appears additional and substantial evidence to the effect that salt was known to control the intake of dietary supplements and drugs prior to 1960 and as early as 1934. (Tr. 218, 247-248, 454, 745.)

27. The defendant itself had made blocks for use in the cattle-feed industry as early as 1956. Different ones of those blocks contained, among other things, dehydrated molasses, liquid molasses, salt, oil, fat and phenothiazine. Defendant also made blocks of dehydrated molasses with liquid molasses as a wet binder. (Tr. 412-422; 442-450.)

28. By admission of counsel for plaintiff, the particular form or shape of the subject matter in the patent in question has no significance over any other shape or form except for the fact that (1) this particular subject matter did set up in block form, and (2) a block form provides certain advantages as are described in the Staley patent. (Tr. 910.)

29. The size and shape of the block is of little signficance in the Staley patent. (Plf. Ex. 2.). Neither is it of special significance that the subject matter is called a "block," "cake," "briquette," or "tablet." (Wright Dep. pp. 148-149, 158, 223-225.)

30. The prior art is replete with items having high proportions of dehydrated molasses in the shape of briquettes and cakes. This is revealed in the Svenska patent, No. 521,332; Dupire patent, No. 713,620; Hughes patent, No. 24,113; Hughes patent, No. 707,113; and De-Tornya patent, No. 12,527. (Def. Ex. M-Doc. G, C, E, B, F.)

31. During prosecution of the application for the Staley patent before the United States Patent Office, Staley cancelled original claim 11 following rejection thereof by the Patent Office. Original Claim 11 read:

> "11. An animal feed block characterized by its resistance to weathering comprising dehydrated molasses bonded by a wet binder, the equivalent amount of molasses in the block being not less than 50%."

This claim was identical to Claim 1 of the current Staley patent except that Claim 1 recites the presence of salt as an ingredient. (Tr. 701-702; Plf. Ex. 3.)

32. The United States Patent Office rejected Original Claim 11 because it was:

> "Unduly broad and inoperative for the purpose disclosed since it fails to recite the presence of salt in the required amount."

It was also rejected on the basis of its being "fully met by Schreiber under 35 U.S.C. 102." The Schreiber referred to therein is Schreiber patent, No. 1,638,963. (Def. Ex. M-Doc. W; Plf. Ex. 3.)

33. At trial, a conflict of evidence appeared in regard to whether or not a nutritionist of ordinary skill in the art in the late 1950's, given a dehydrated molasses block, would have added salt as an ingredient of the block in order to control its consumption. Witness Burns stated that this was obvious to one skilled in the art, while witness Bartley testified to the contrary. (Tr. 743-744; 952-953.) The Court, after reviewing the entire record, finds from the whole of the evidence that such an addition was obvious to one skilled in the art.

34. In the latter 1950's, it was obvious to one skilled in the art of animal nutrition and block-making, to use a wet binder, and particularly wet molasses. (Tr. 747.)

35. Claim 2 of the Staley patent is identical to Claim 1 except Claim 2 adds 1-4% of mineral oil and edible fat to the block. There is nothing of particular significance in the percentage specified. (Tr. 757.)

36. To include fat or oil in a molasses block is disclosed in the prior art, namely, Australia patent, No. 205,187. (Def. Ex. M-Doc. T; Tr. 715-716.)

37. Defendant itself was in 1956 adding oil or fat as ingredients in its protein and mineral blocks. (Tr. 417-419.)

38. In the year 1959, it was obvious to a man of ordinary skill in the art to add oils to feed blocks in order to increase their weathering capability and to facilitate the block-making process. (Tr. 748, 754.)

39. Claim 3 of the Staley patent is identical to Claim 2, but specifies that the wet binder is wet molasses. As was noted in Findings, 17, 18 and 34, supra, the use of wet molasses as a binder was disclosed in the prior art, was used commonly in the industry, and its use was obvious to one skilled in the art.

40. Claim 5 of the Staley patent is identical to Claim 2, except the amount of salt ranges from 5 to 20%, instead of from 5 to 40%.

41. The prior art revealed the concept of varying the amount of salt in mixtures in order to arrive at the desired daily consumption. (Def. Ex. M-Doc. M; Tr. 729-732, 744.)

42. Plaintiff itself found after testing that salt percentages up to 20% did not affect the consumption rate. (Def. Ex. A; Tr. 121.)

43. The defendant, in making its protein blocks in 1957, included salt in the amount of 13-14% in order to control their consumption. (See Findings 20 and 21.)

44. The Court finds as a matter of fact that the salt range of 5-20%, as set out in Claim 5 of the Staley patent, was old in the art and was obvious to one skilled in the art as of 1957.

45. Claim 6 of the patent in suit is similar to Claim 2, except that it specifies a salt content of from 15-23%, a dehydrated molasses content of from 70-77% (with the

dehydrated molasses having a molasses equivalent of from 85-90%), and a wet binder of from 5-12%.

46. Relative to the salt content of Claim 6, the Court finds it to be old in the art and obvious to one skilled in the art. (See Findings 41-44, supra.)

47. As to the percentage of dehydrated molasses (and its molasses equivalent) in Claim 6, such was disclosed in prior patents and is thus completely anticipated. (See Findings 15, 16.)

48. Regarding the portion of Claim 6 which sets forth a wet binder of 5-12%, there is no special significance to that range as opposed to any other percentage range. (Tr. 757.)

49. Claim 7 of the patent in suit is identical to Claim 6, with the single exception being that the amount of wet binder is designated as being 7-9%, rather than 5-12%. This range is of no special signfiicance. (Tr. 758.)

50. Claim 8 is identical to Claim 7, except that it designates the wet binder as being wet molasses. As noted before, this was disclosed in the prior art and was common in the industry. (See Findings 17, 18.)

51. Claim 9 of the subject patent is identical to Claim 2, except for the addition of "a horn fly controlling amount of phenothiazine . . ." The concept of incorporating this particular drug in a block of molasses as a preventative for worms is disclosed in Australian patent, No. 205, 187. (Def. Ex. M—Doc. T, U.)

52. The patentees did not discover the use of phenothiazine as a horn fly control, said usage having been made as early as 1938. (Tr. 95, 299.)

53. As early as 1957, defendant was incorporating phenothiazine into its mineral and protein blocks. (Tr. 412, 425, 744-745.)

54. A nutritionist of ordinary skill in the art in the latter 1950's, in preparing to put out a dehydrated molasses feed block, would have found it obvious to include phenothiazine in such a block in order to control horn flies. (Tr. 745.)

55. Claim 10 of the patent is directed at a "method for preparing an animal feed . . ." The Court finds this claim to be old and completely anticipated in the prior art, specifically in the Arnold patent, No. 1,996,395. (Def. Ex. M—Doc. Z; Tr. 758.)

56. Claim 11 is directed at a method for controlling the consumption of molasses in cattle to a specified daily amount. The manner in which this is to be done is by "feeding cattle an animal feed block . . ." as is described in Claim 1 of the subject patent. As has been discussed earlier in these findings, animals have been fed through block prior to the present patent, and the patent in suit suggests nothing new or different in the way the feed block is to be fed to animals. The same method has been utilized for years prior to this patent, and has been done so even by the defendant herein. (Tr. 759.) The consumption is controlled by salt, and as has been mentioned hereinabove, this has been found to be old in the prior art. (See Findings 20-26.)

57. The Court finds as a matter of fact that the United States Patent Office failed to cite the most relevant prior art when it granted the Staley patent.

58. In making the foregoing findings, the Court has specifically relied on the weight and credibility of the evidence, given attention to the testimony of the extremely well-qualified expert witnesses on both sides, with special credulity being imparted to defendant's expert witness Burns as to the state of the art, which the Court found to be buttressed with an abundance of written evidence in the form of former patents and learned treatises, negativ-

ing both the novelty and nonobviousness requirements for a patentable product.

59. It is understood that defendant contends plaintiff failed to sustain its burden of proof as to infringement of Claims 1-3 and 5-10 because there was no proof adduced by the plaintiff that the defendant's blocks were, in fact, "resistant to weathering." Assuming the validity of the patent in issue, the Court, upon examining the record, finds this contention to be unsupported and without merit. (Tr. 323, 365, 372-373.)

60. In this vein, defendant also contends that the plaintiff did not prove infringement of Claims 6-8 because there was no evidence that the accused blocks of the defendant contained the requisite amounts of dehydrated molasses (70-77%), wet molasses binder (7-9%) and fat (1-4%). Again, a careful review of the record reveals this contention to be unfounded. (Tr. 311-338, 369.)

61. The defendant also urged that plaintiff failed to prove infringement of Claim 9, in that, according to defendant, plaintiff did not show that defendant's blocks contained a "horn fly-controlling amount of phenothiazine." The Court finds this contention to be without merit, since the essence of defendant's sales claim is that its block containing phenothiazine will control horn flies. (Tr. 333, 366-368.)

62. A similar contention was made by the defendant as to Claim 11 of the Staley patent, i.e., that plaintiff did not prove defendant "controlled or induced the controlling of molasses consumption in cattle to a level not in excess of one pound per day." Here, again, the Court finds evidence to the contrary in the record, thereby voiding this contention. (Tr. 318, 365-366.)

63. The defendant has claimed that it has been damaged by plaintiff, in that plaintiff allegedly used the patent in

suit to control competition, and that plaintiff allegedly improperly publicized its patent in order to gain an unfair competitive advantage. The Court finds no evidence in the record supporting this contention.

Conclusions of Law

1. The three statutory requirements for patentability are: (a) novelty; (b) utility; and (c) nonobviousness. See 35 U.S.C.A. §101-103.

2. The patent at issue here fails to meet two of the three requirements, specifically, novelty and nonobviousness.

3. The evidence before the Court shows that the prior art discloses each and every concept, component and limitation of the eleven claims of the Staley patent.

4. A patent is presumed to be valid and a patent's invalidity must be shown by clear and convincing evidence. Such evidence is abundantly present in this record. See 35 U.S.C.A. §282; *Eimco v. Peterson Filters*, 406 F.2d 431 (10 Cir. 1968).

5. The statutory presumption of validity has also been rebutted herein because the United States Patent Office failed to cite the most pertinent prior art, which was subsequently introduced by the defendant at trial. See *M. B. Skinner v. Continental Industries, Inc.*, 346 F.2d 170 (10 Cir. 1965).

6. The evidence before the Court shows that the differences between the subject matter contained in the claims of the Staley patent and the prior art are such that the subject matter as a whole would have been obvious at the time of the claimed invention to a person having ordinary skill in the art to which the subject matter pertained. See *Graham v. John Deere*, 383 U.S. 1, 86 S.Ct. 684 (1964); *M. B. Skinner Company v. Continental Industries, Inc.*, supra.

7. The record shows that plaintiff abandoned its proposed claim for a patent on a block characterized by its resistance to weathering and comprising dehydrated molasses bonded by a wet binder, the equivalent amount of molasses in the block being not less than 50%. The only difference between that abandoned claim and Claim 1 of the Staley patent is 5-40% sodium chloride. That difference was obvious to one skilled in the art and, consequently, Claim 1 is invalid. *Graham v. Deere*, supra.

8. Claims 2 through 9 are variations in recipes of the components set forth in Claim 1, with additives in addition to Claim 1 being edible mineral oil or animal fat, and the medicant phenothiazine, all of which variations were without significance from Claim 1 and were from prior use of publication obvious to one skilled in the art of animal nutrition.

9. Claim 10, referring to a method for preparing the recipes of Claims 1 through 9 in block form, and Claim 11, referring to a method for controlling consumption of molasses in cattle based on the Claim 1 recipe, were neither novel nor nonobvious to one skilled in the art of animal nutrition.

10. Claims 1 through 11 of the subject patent are invalid.

11. There can be no infringement of an invalid patent; therefore, infringement is not present in this case. See *M. B. Skinner Company v. Continental Industries, Inc.*, supra.

12. The defendant's counterclaim alleging that plaintiff attempted to use its patent to control competition has no evidentiary basis in fact and is without merit; it is therefore denied.

13. The defendant is not entitled to be awarded its attorney fees under 35 U.S.C.A. §285.

14. The Clerk is directed to enter judgment for the defendant and against the plaintiff upon the complaint, taxing the costs herein to the plaintiff.

Addendum Comment

The history of patent law in the United States, from its English origins in the Statute of Monopolies to its constitutional foundation in Art. 1, § 8, Ch. 8, and through its statutory and judicial growth and implementation, was well and interestingly stated by Justice Clark in 1966 in **Graham v. Deere**, supra. In discoursing on the last statutory enactment of 1952, Justice Clark spoke of patent criteria as follows:

> "The 1952 Patent Act sets out the conditions of patentability in three sections. An analysis of the structure of these three sections indicates that patentability is dependent upon three explicit conditions: novelty and utility as articulated and defined in § 101 and § 102 (35 U.S.C., § 101 and § 102), and nonobviousness, the new statutory formulation, as set out in § 103 (35 U.S.C., § 103) . . ."
>
> (**Graham**, p. 691 of 86 S.Ct.)
>
> "Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved."
>
> (**Graham**, p. 694 of 86 S.Ct.)

This lawsuit involves the patentability of a molasses feed block for ruminant livestock. From the evidence produced at the trial—much of it in lengthy documentary form of former patents and learned treatises—and applying the applicable law, the Court has concluded the Staley patent discloses no invention. It deals entirely with select-

ing desired recipes for a block performing salutary, dietary and veterinary objectives, and which is commercially saleable in a highly competitive industry. There is no new ingredient in these recipes. Each ingredient is present for its age-old purpose of supplying a particular food or medicinal value. There is no new cooperation among the ingredients that produces either a different product or a different result than is known in the prior art. Nor could the fact, apparent from the evidence, that Staley was in the commercial field with an animal feed block which better filled a long-felt want and enjoyed commercial success, make the item patentable. **Anderson's Black Rock, Inc. v. Pavement Salvage, Inc.**, 90 S.Ct. 365 (1969)..

The ultimate conclusion of law here is that the patent in issue, while having usefulness or utility, lacks the required conditions of novelty and nonobviousness.

In accordance with the Findings of Fact and Conclusions of Law, the Clerk shall enter judgment herein without further journal entry.

At Wichita, Kansas, this 13th day of October, 1970.

FRANK G. THEIS
United States District Judge

APPENDIX B

Judgment (Docket Entry) of the District Court

70—Oct 13 Decision of the Court, filed and Entered; **Theis,** Judge: Findings of Fact and Conclusions of Law. There can be no infringement of an invalid patent; therefore, infringement is not present in this case. The Defendant's counter-claim alleging that plaintiff attempted to use its patent to control competition has no evidentiary basis in fact and is without merit; it is therefore denied. The defendant is not entitled to be awarded its attorney fees under 35 U.S.C.A. 285. The Clerk is directed to enter judgment for the defendant and against the plaintiff upon the complaint, taxing the costs herein to the plaintiff. Addendum Comment. The ultimate conclusions of law here is that the patent in issue, while having usefulness or utility, lacks the required conditions of novelty and nonobviousness. In accordance with the Findings of Fact and Conclusions of Law, the Clerk shall enter judgment herein without further journal entry.

APPENDIX C

Opinion Below of the Circuit Court of Appeals

United States Court of Appeals
Tenth Circuit

November Term, 1971

A. E. Staley Manufacturing Company,
Plaintiff-Appellant,
v.
Harvest Brand, Inc.,
Defendant-Appellee.

No. 71-1049

Appeal From the United States District Court for the District of Kansas

(Filed December 2, 1971)

John W. Hofeldt, Chicago, Illinois, for Plaintiff-Appellant.

Edmund C. Rogers and John M. Howell, Clayton, Missouri, for Defendant-Appellee.

Before Pickett, Hill and Barrett, Circuit Judges.

Barrett, Circuit Judge.

This is a patent infringement suit brought by the A. E. Staley Manufacturing Company against Harvest Brand,

Incorporated, alleging an infringement of Staley's patent No. 3,246,336 which Staley has owned since it was issued on April 12, 1966. The patent application was filed on April 8, 1963.

Staley's patent describes a cattle feed block which combines dehydrated molasses, liquid molasses as a wet binder, significant amounts of salt, and some type of mineral oil or edible fat. The resulting product is a highly palatable feed block for cattle or sheep from which they will eat a surprisingly consistent amount each day. Two novel benefits are derived from this regulated consumption. First, although molasses is very beneficial to cattle, too large an intake can cause scouring or diarrhea. This problem has been eliminated in the Staley patent block. Second, because cattle like the taste of molasses, unpalatable medicines can be added to the Staley block and cattle will consume them in a controlled amount. The Staley patent feed block thus accomplished two new and novel results.

The lower court found that the patent was infringed but that it was not valid. The Court found that the patent had utility but that it did not have novelty as required by 35 U.S.C., § 102, and that it was not non-obvious as required by 35 U.S.C., § 103. From this decision Staley appeals.

The lower court made no findings of fact which would negate the claim of novelty. Novelty can be disproved by showing anticipation or aggregation. McCullough Tool Company v. Well Surveys, Inc., 343 F.2d 381 (10th Cir. 1965), cert. denied 383 U.S. 933 (1966). This court said in Griswold v. Oil Capital Valve Co., 375 F.2d 532 (10th Cir. 1966), at 537 that:

> "The doctrine of anticipation by patents is a narrow and technical one. To come within it, all the elements

> of the invention, or comparable ones, must do substantially the same work in substantially the same way and be within one structure. (Citation omitted). As to the matter of aggregation, the doctrine requires that the prior patents, or the art generally, demonstrate the segments or elements with substantially the same results and functions."

The Court stated in its finding of fact No. 58 that a review of all evidence disclosed a lack of novelty and non-obviousness, both of which are requirements for a patentable product. We disagree. There were no findings of fact concerning anticipation or aggregation, notwithstanding the rule that the law presumes a patent valid. 35 U.S.C.A., § 282. The great weight of the evidence does not support the Court's conclusion on the issue of novelty.

35 U.S.C.A., § 282, provides that one who seeks to have a patent declared invalid has the burden of establishing its invalidity by clear and convincing evidence. We have conducted a thorough review of the record. In our judgment, appellee Harvest Brand has failed to sustain this burden. [For a detailed discussion of the law concerning novelty in this Circuit see Scaramucci v. Dresser Industries, Inc., 427 F.2d 1309 (10th Cir. 1970).]

Turning now to the issue of obviousness prescribed under 35 U.S.C.A., § 103, we have reviewed the prior art in order to determine whether a person ordinarily skilled in the art would find it obvious to combine the same elements in the same manner as Staley's patent teaches us.

The record reveals that a person ordinarily skilled in the art would know that:

1. Animal feed blocks had been made in the past such as salt blocks, mineral blocks, protein blocks and molasses blocks.

2. Molasses had been used as a feed supplement and a carrier of unpalatable medicines.

3. Mineral oils had been used to facilitate blocking and improve the weatherability of blocks.

4. Feed supplements had been used which had high levels of salt.

5. Blocks had been made which used wet molasses as a wet binder.

The trial court made detailed findings to the effect that each and all of the ingredients employed by Staley in its patented block were well known to a man of ordinary skill in the art. The Court did not, however, make any findings dictated by the great weight of the evidence in the record reflecting the failures and drawbacks of the prior art in accomplishing the novel result achieved through the Staley patent. Each of the prior arts above referred to were wrought with practical limitations:

1. Protein and mineral blocks were designed to fill a particular need not necessarily connected with the function of a molasses-salt block. As a carrier of medicines they were failures because they were not palatable enough to cattle to hide the taste of the medicines and their consumption was too variable.

2. Molasses has long been known to aid animals with rueminate digestive tracts in digesting roughage. It has also been known to cause scouring if taken in large amounts. No molasses product was ever made before Staley's patent which allowed a livestock operator to place the medicine carrier unattended near his stock and be assured that his cattle were getting a proper amount of medicine, Protein and mineral blocks had too great a variation of daily intake to be successfully used. All previous molasses products were too palatable to use successfully as

medicine carriers. The aggressive cattle would overfeed and the timid cattle would underfeed.

3. Mineral oils were a rather novel and effective addition to the prior art. However, the addition of oils in large amounts softened the blocks.

4. Large amounts of salt have been incorporated into mineral and protein blocks to control consumption. The amount of salt used normally in these blocks is roughly the same amount as Staley used. However, with the highly palatable molasses blocks the daily consumption is relatively stable while the less palatable mineral and protein blocks show a relatively high rate of daily variation.

The evidence proves that cattle develop a tolerance for salt which they like. This can eventually lead to salt poisoning. As a factor in determining the prior art, this would lead one to believe that a block with a high salt content, especially when mixed with the highly palatable molasses, would slowly cause cattle to consume an increasingly larger daily ration. However, this is not true of Staley's block.

5. The use of a wet binder in molasses blocks was old in the art. Wet molasses had been used as a wet binder with dehydrated molasses to make the blocks easier to form. Wet molasses, however, causes blocking and storage problems.

Harvest Brand claimed that the prior art would teach one to mix salt, molasses (dehydrated and wet), and oil. Its own history belies this. In 1958 Harvest Brand made 100 non-infringing dehydrated molasses blocks with a wet binder for a customer. It claimed that these blocks were successful, yet several years later when it made blocks for public sale it sold blocks which the lower court found infringed on Staley's patent.

Staley introduced evidence showing the state of the art when it put its product on the market. Within two months after Staley marketed its patented block, VyLactos Laboratories was selling a non-infringing block called "Kattle Kandy." It contained molasses, a high protein level (22%) and salt (1%). A witness from VyLactos testified that the salt level was 1% because that is what the experts recommended at that time. He also stated that consumption was regulated by the block density, i.e., the harder the block, the less each animal consumed. He admitted that the block was too palatable and that one had to limit the number of blocks available to the cattle because they would overfeed. VyLactos also had trouble with weatherability. Its blocks did not hold up well in rain. After about a year, VyLactos stopped producing its "Kattle Kandy" and introduced a block which is almost identical to Staley's block.

Harvest Brand's expert witnesses testified that it would have been easy for anyone in the feed block business to come up with Staley's block in 1962. A Staley expert in animal feeds had previously testified that in 1962 he would have been dubious about the success of any molasses blocks which contained high levels of salt. He stated that molasses and salt are hygroscopic, i.e., they both absorb large amounts of water. He also stated that they are water soluable. For these reasons, he and a Harvest Brand witness opined, one would expect serious weathering problems in a block containing salt and molasses. Another witness for Harvest Brand stated that since salt and molasses have different characteristics, one would expect problems during the blocking process. The witness testified that from his own tests in 1963 he found that molasses needs high pressure plus some water to block successfully. Salt, however, requires low pressure and an absence of water to block well. At the time these tests were conducted, Har-

vest Brand had not been able to make a successful block combining salt and molasses.

Harvest Brand points out that before 1962 there were many patents involving feed blocks, molasses products, molasses with medicine, and blocks with oil among others. However, most of these patented inventions had serious drawbacks. We said in McCullough Tool Company v. Well Surveys, Inc., 343 F.2d 381 (10th Cir. 1965), cert. denied 383 U.S. 933 (1966), *supra*, at 399 that:

> "Rudimentary or unsuccessful experiments with isolated elements of a combination do not anticipate an invention which successfully combines those elements" (Citations omitted).

Staley admits that all of the elements are old and known in the art. However, Staley argues that as it overcame all of the problems and went against the teachings of the prior art to develop the patented block, it qualifies for a patent. We agree. As we said in **McCullough**, *supra*:

> "The general rule is that before a device may be patentable, the improvement over the prior art must involve more than would be obvious to one of ordinary skill in the art (Citations omitted). If those skilled in the art are working in a given field and have failed after repeated efforts to discover a particular new and useful improvement, the person who first makes the discovery does more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor" (Citations omitted). 343 F.2d at 399.

We feel that Staley has made such an improvement. In Bewal, Inc. v. Minnesota Mining and Manufacturing Company, 292 F.2d 159 (10th Cir. 1961), the test for determining whether a combination was patentable was stated. At 164 we said:

"When old elements are united in such a manner that the union accomplishes either a new result or an old result in a more facile, economical and efficient way in a particular environment which presented peculiar and difficult problems, it is a true combination and patentable" (Citations omitted).

Staley's inventors overcame serious practical problems in arriving at their patent and advanced the art to a new level of achievement.

The invention requires only four ingredients. The amounts are not too critical. However, simplicity is not a bar to invention as long as the steps taken are not obvious to the ordinary mechanic. Blish, Mize and Silliman Hardware Company v. Time Saver Tools, 236 F.2d 913 (10th Cir. 1956), cert. denied 352 U.S. 1004 (1957); Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac Company, 321 U.S. 275 (1944).

We are mindful of the rule stated in Scaramucci v. Dresser Industries, Inc., 427 F.2d 1309 (10th Cir. 1970), *supra*, that the ultimate validity of a patent is a legal question for the trial court, based on findings of fact.

Staley's contested patent recognized that the value of feeding molasses to livestock was old in the art. It recited, however, the nutritional values and drawbacks which had previously restricted the use of feeds containing a high percentage of molasses, i.e., excessive consumption had exceeded the most efficient feed utilization and could not be conveniently and economically fed in open range. The key claim, then, in the Staley block was the use of a high percentage of molasses with salt which proved (1) to be resistant to weathering in the open range; (2) to provide in a controlled manner a source of fermentable carbohydrates for ruminants; (3) to control consumption on an economical per unit basis; and (4) to be a palatable feed block which could include a horn fly controlling amount of phenothiazine. Appellant argues

that the product of these claims was entirely new and that the new product proved to have a different and surprising result. We agree. There was no contrary argument, and the lower court specifically found that the Staley feed block is useful and performs the beneficial functions claimed for it. The question of invention and thus, patentability, is one of fact involving consideration of novelty, utility, commercial success, satisfaction of long-felt want, unsuccessful efforts of others, public acquiescence in validity, imitation, experiments, and independent production by others. 69 C.J.S., Patents, § 70 (1951).

Substantial evidence means evidence which affords a substantial basis of fact to support a conclusion. Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 (1938). In its Addendum Comment the trial court concluded that "There is no new cooperation among the ingredients that produces either a different product or a different result than is known in the prior art." Having thus found, the Court specially concluded that the Staley patent lacks novelty and non-obviousness. This conclusion necessarily involved application of the fact-law process. We are persuaded, on the entire evidence, that a mistake has been committed. See United States v. United States Gypsum Co., 333 U.S. 364 (1948). We hold that the district court erred in its conclusion that the Staley patent lacked novelty and non-obviousness. Therefore, we must reverse. We hold that the Staley patent is valid. We remand for further proceedings determinative of Staley's prayer for injunctive relief and damage award.

Reversed and remanded.

Pickett, Circuit Judge, dissenting. No. 71-1049

In reversing the trial court and sustaining the patent in this case, I think we are guilty of weighing the evidence and failing to observe the "clearly erroneous" rule. The patent defines a compressed feed block for cattle contain-

ing sodium chloride (salt), dehydrated molasses, mineral oil or edible fat, wet molasses, and phenothiazine. It is agreed that all of these elements were known in the prior art and were not invented by Staley, and that the patent in suit was issued as a result of a combination of these elements. Generally, when old elements are combined together in a manner which secures a new and useful result, or an old result in a more facile, economical and efficient manner, the result is patentable. Scaramucci v. Dresser Industries, Inc., 427 F.2d 1309 (10th Cir. 1970); Eimco Corporation v. Peterson Filters and Engineering Co., 406 F.2d 431, 434 (10th Cir. 1968), cert. denied, 395 U.S. 963 (1969). The essentials of patentability are that the invention be (1) useful, (2) new, and (3) nonobvious to a person skilled in the art. 35 U.S.C., §§ 101, 102, 103; Graham v. John Deere Co., 383 U.S. 1, 12 (1966). A mere aggregation of old elements which performs no new function or produces no different result than that previously produced is not patentable. Scaramucci v. Dresser Industries, Inc., *supra*. The issues of novelty and nonobviousness present questions of fact to be determined by the trial court and these findings are not to be disturbed on appeal unless clearly erroneous. Boutell v. Warren Volk & Wilson-Volk, Inc., 449 F.2d 673 (10th Cir., Oct. 22, 1971); Scaramucci v. Dresser Industries, Inc., *supra*; Eimco Corporation v. Peterson Filters and Engineering Co., *supra*; Graham v. John Deere Co., *supra*[1]

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[1] For the purpose of suggesting some guidelines to be helpful to the trial courts in determining factual inquiries as to nonobviousness, it was said in Graham v. John Deere Co., 383 U.S. 1 (1966), at 17-18:

> "While the ultimate question of patent validity is one of law, **A. & P. Tea Co. v. Supermarket Corp.**, *supra*, at 155, the § 103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be determined; differences between the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art re-

Although there was other evidence, the parties to this litigation relied primarily on the testimony of expert witnesses. The trial court made detailed and exhaustive findings relating to the novelty and nonobviousness of the patent. It was specifically found that the prior art revealed the concept of varying the quantity of salt in mixtures to regulate consumption of food by cattle, and that the use of molasses as a binder in making feed blocks was also known to the art. The other ingredients as used in the patentee's feed block were found to be old. In more or less of a summary of its findings, the trial court said:

> "In making the foregoing findings, the Court has specifically relied on the weight and credibility of the evidence, given attention to the testimony of the extremely well-qualified expert witnesses on both sides, with special credulity being imparted to defendant's expert witness Burns as to the state of the art, which the Court found to be buttressed with an abundance of written evidence in the form of former patents and learned treatises, negativing both the novelty and nonobviousness requirements for a patentable product."

I shall not attempt to detail the facts, but from a careful review of the record I am satisfied that the trial court's findings are not only supported by substantial evidence, but by a preponderance of the evidence. I would affirm.

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solved. Against this background, the obviousness or nonobviousness of the subject matter is determined. . . .

"This is not to say, however, that there will not be difficulties in applying the nonobviousness test. What is obviousness is not a question upon which there is likely to be uniformity of thought in every given factual context. The difficulties, however, are comparable to those encountered daily by the courts in such frames of reference as negligence and scienter, and should be amenable to a case-by-case development. We believe that strict observance of the requirements laid down here will result in that uniformity and definiteness which Congress called for in the 1952 Act."

APPENDIX D

Judgment of the Circuit Court of Appeals

November Term—December 2, 1971

Before Hon. John C. Pickett, Hon. Delmas C. Hill and Hon. James E. Barrett, Circuit Judges

A. E. Staley Manufacturing Co.,
Plaintiff-Appellant,
v.
Harvest Brand, Inc.,
Defendant-Appellee.

No. 71-1049.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said Court is reversed and the cause is remanded for further proceedings in accordance with the opinion of this Court; Pickett, Circuit Judge, dissenting.

HOWARD K. PHILLIPS, Clerk
By: /s/ HELEN R. BARTHA
Deputy Clerk

APPENDIX E

Motion for Extension of Time in Which to File a Petition for Rehearing and for Leave to File a Supplement to the Petition

(Filed December 13, 1971)

In the
United States Court of Appeals
For the Tenth Circuit

A. E. Staley Manufacturing Company,
Plaintiff-Appellant,
v.
Harvest Brand, Inc.,
Defendant-Appellee.

Appeal No. 71-1049.

Now comes appellee, Harvest Brand, Inc., and moves this Court for an extension of fourteen (14) days' time until December 30, 1971, in which to petition for rehearing in the above matter. This extension is necessary due to the very recent and sudden death on November 7, 1971, of one of the partners of the law firm representing appellee which has resulted in an extremely heavy work load on the four remaining members of the firm. We beg the Court's indulgence and ask that the extension be granted.

Appellee further moves the Court for leave to file a supplement to the petition of not over fifteen (15) pages which will set forth the factual assertions made in appellant's briefs upon which the Court apparently relied but which are false or grossly overrstated. Because of

the great number of such assertions, it is not possible to cover them and the other grounds for the rehearing in the ten (10) pages allowed.

KINGSLAND, ROGERS, EZELL, EILERS & ROBBINS
By JOHN M. HOWELL
Suite 2162, Pierre Laclede Center
7733 Forsyth Boulevard
St. Louis, Missouri 63105
Tel. No. (314) 727-5188
Attorneys for Defendant-Appellee

APPENDIX F

Order Granting Motion for Extension of Time and Leave to File a Supplement

In the United States Court of Appeals
for the Tenth Circuit

A. E. Staley Manufacturing Company,
Plaintiff-Appellant,
v.
Harvest Brand, Inc.,
Defendant-Appellee.

Appeal No. 71-1049.

Motion for extension of time in which to file a petition for rehearing and for leave to file a supplement to the petition.

Granted
to 12-30-71
Judges Pickett, Hill, Barrett
Dec. 16, 1971

HOWARD K. PHILLIPS, Clerk
By: /s/ HOWARD K. PHILLIPS
Deputy Clerk

APPENDIX G

Petition for Rehearing; and Petition that Rehearing En Banc Be Granted

(Filed Dec. 29, 1971)

In the United States Court of Appeals
for the Tenth Circuit

A. E. Staley Manufacturing Company, Plaintiff-Appellant, v. Harvest Brand, Inc., Defendant-Appellee.	Appeal No. 71-1049.

Defendant-Appellee hereby petitions for a rehearing of the decision of the court entered December 2, 1971, for reasons hereafter set forth. Time to file the Petition, and to file the accompanying supplement, was extended to December 30, 1971.

Because of the importance of the issue presented by this Petition and the apparent inconsistency in this circuit in interpreting rule 52(a) FRCP, it is requested that the rehearing be held en banc.

The decision here is inconsistent with the established rules of this circuit that findings based upon reasonable evidence will be sustained on appeal, that findings based upon credibility of expressly preferred witnesses will not be upset, and that findings based upon disputed evidence will be sustained, FRCP 52(a). **Scaramucci v. Dresser Industries, Inc.**, 427 F2d 1309 (CA 10); **Eimco Corporation**

v. Peterson Filters and Engineering Co., 406 F2d 431 (CA 10); **Boutell v. Volk**, 449 F2d 673 (CA 10); **McCullough Tool Company v. Well Surveys, Inc.**, 343 F2d 381 (CA 10); **Admiral Corp. v. Zenith Radio Corp.**, 296 F2d 708 (CA 10); and **M. B. Skinner Co. v. Continental Industries, Inc.**, 346 F2d 170 (CA 10).

The decision places a melancholy imprimatur upon misrepresentation, exaggeration, and distortion of the record by an appellant. And it may destroy defendant with damages in a day of tight money.

The case presents as grave a problem in appellate court procedure as could occur since the new appellate rules. For this court has interpreted the rules so as to create a dilemma that actually denied appellee the hearing to which it was entitled.

There is an irreconcilable conflict between, on the one hand, limiting an appellee to a fifty-page brief and a thirty-minute argument, and, on the other hand, opening findings of fact to a plenary review and revision in a scientific patent case that took a week to try. Let us explain.

When we, as appellee, were confronted with how to brief this case on appeal, we decided to spend the fifty pages and thirty minutes showing how there was substantial evidence supporting each finding, and had to forego pointing to the multitude of false and misleading statements in the briefs of appellant. For plaintiff's briefs were **not** based on the record made below, but on a nonexistent, imaginative record created by the fertile imagination of appellant. Our dilemma was based upon the rule heretofore effectively established that findings supported by substantial evidence will be sustained.

The Court's interpretation of the rules puts an appellee in an impossible position. All an appellant has to do is

cram into its briefs as many unsupported allegations of facts as possible. Appellee then must make a choice of answering those assertions or presenting its own case. It cannot do both within the time and space limitations, and without doing both, it cannot get a fair hearing.

The danger in the approach of the court is serious. To give an example: the Court reversed a finding of fact based upon an express statement of the trial court that as to the prior art it believed one witness, Burns, over another witness, Bartley. This Court has said no, it believes Bartley. We submit we should not have had to argue that finding based on credibility, so that our omission of argument *in extenso* was justified.

Another example: this Court relied upon an alleged failure of one of defendant's witnesses to produce the blocks in question back in 1939. Actually the testimony was only a passing question to the witness to obtain an explanation of cast blocks in comparison with pressed blocks. No question of success or failure was involved. The trial judge knew this, and evaluated the colloquy accordingly. But on appeal, appellant blew it up into a major failure to make blocks and this court has been led into using it as a critical example of failure. It was no such thing.

How can an appellee re-create the climate around the interrogation in the trial court so that the appellate judges can know the emphasis, and can sense the proportionate value of single episodes in a trial that took a week?

Or take another thing: this Court said flatly that cattle like salt, and, developing a tolerance for it, try to eat too much, leading to salt poisoning. True, appellant said so, citing E 196, which has only a footnote reference to the death of one cow for speculative reasons. There was no supporting testimony explaining this. But there is also much evidence about successful feeding of cows with larger amounts of salt than were fed to that single un-

fortunate beast, and abundant conclusions that salt poisoning was not a problem.

Another thing: This Court said that the trial court made no findings "reflecting the failures and drawbacks of the prior art in accomplishing the novel result" of the Staley patent (Op. 5). The **same argument** about alleged failures by MFA, VyLactos, and Harvest Brand were made in substantially the **same language in Staley's brief below,** and **rejected** because **untrue.** What kind of findings should have been made? Should the trial court find **non**-facts?

Unless this Court gives credence to the trial judge's ability to determine the facts as presented in person to him, the only alternative for a fair hearing on appeal is a far more extensive presentation of the facts at the appellate level than the time and length limitations of the Appellate rules allow.* Since this Court has altered the rule, and has reversed on facts, at least we can properly ask a full hearing and opportunity to set the facts straight.

The Issues on Appeal

Since we are asking for a rehearing en banc, we note that the two primary issues of this case are as follows:

1. It being old to make self-feeding feed blocks containing protein and molasses including large percentages of salt to limit consumption, and old to make feed blocks containing over 50% molasses, was it obvious to either increase the amount of molasses in the first block to over 50%, or use such quantities of salt to control the consumption of the second block already containing over 50% molasses?

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* At most, if the appellate court feels that no finding on a critical point has been made, it should send the case back for such findings, where plenary treatment can be had.

2. Subsidiary to the above: It being old to make protein phenothiazine blocks with salt to control consumption, and it being old to make molasses-phenothiazine blocks, was it patentable to use salt to limit consumption of the molasses-phenothiazine blocks?

The trial court, on the facts, held neither to be patentable.

The "Facts" Relied Upon by This Court's Opinion Are in Error and Untrue

This Court in its opinion has based its findings on assertions by appellant in its briefs that, simply and bluntly stated, are false, misleading and unsupported. For examples, the following statements in the Opinion carried over from plaintiff's briefs, **simply are not true.**

1. This Court erred in saying that the lower court found the patent anticipated under 35 USC 102 (Op. 3), implying that the Court failed to distinguish between Sections 102 and 103 of the Code.

The lower court found only the two method claims 10 and 11 anticipated (Fdgs. 55 and 56, A. 44), and no others. This court has been led to confuse the issue of anticipation (Sec. 102) of those two process claims with the issue of obviousness (Sec. 103) of the remaining claims. If Claim 11 is upheld, any farmer who simply puts a molasses-salt block out in his field is an infringer. Did the court intend this?

2. This court erred in saying that there were no findings of fact concerning anticipation or aggregation (Op. 4). But anticipation of claims 10 and 11 was found as above stated (Fdgs. 55 and 56, A. 44), and aggregation was spelled out in detail in the Addendum. This court has apparently not understood that when the trial court said (A. 48-9):

> "* * * Each ingredient is present for its age-old purpose of supplying a particular food or medicinal value. There is no new cooperation among the ingredients that produces either a different product or a different result than is known in the prior art. * * *",

it was simply using the **definition** of aggregation instead of the **word.** The definition should at least equal the word. This was a critical error by this Court, because this Court reversed the fact finding that salt did only the same thing in molasses blocks that it had in prior blocks.

3. This Court erred in saying that protein blocks were failures because they were not palatable enough to cattle to hide the taste of the medicines and their consumption was too variable (Op. 5 and 6). Here this Court has made its own finding, which actually is false, based on false representations by plaintiff. How could it be true, since defendant still sells the protein blocks with salt and phenothiazine? How can it be true when **plaintiff's** advertising asserted that salt was used in its molasses blocks for the same purpose as it had been used in protein blocks? Would plaintiff have based that advertising claim on a failure?

4. This Court erred in saying that all previous molasses products were too palatable to use successfully as medicine carriers. The aggressive cattle would overfeed and the timid cattle would underfeed (Op. 6).

The statement is inaccurate, as the Arizona block contained molasses and protein and salt to control consumption.* Legally it is beside the point, because the issue is whether it is patentable to employ salt to control con-

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* That the Arizona block contained protein as well as molasses, with salt to control consumption, should be considered along with the statement in plaintiff's patent (E. 24, col. 3, l. 43) that "Proteins, minerals, vitamins and other nutritional supplements . . . may be incorporated into our feed blocks" so long as 50% molasses equivalent is present, and salt.

sumption of molasses blocks when it was well-known to control overeating of blocks with salt. The solution was present ahead of the problem.

If overeating were true of molasses blocks, it also had been true of protein blocks. Why add big amounts of salt to protein-phenothiazine prior art blocks except that otherwise the cattle would overeat them? This Court's new fact finding misses the point, which is that, assuming the molasses-phenothiazine block of the prior art (Australian patent) were over-eaten, would an animal dietician of 1960, who knew about using salt to control consumption of over-tasty feed blocks, have obviously concluded to try salt to control the molasses block consumption?

5. This Court seems to have erred, as far as we can understand its statement, in saying that mineral oils were a rather novel and effective addition to the prior art, but that the addition of oils in large amounts softened the blocks (Op. 6).

What is the significance of this? What record supports it? Certainly the record abundantly establishes that all prior art blockers knew to add enough oil to improve weatherability and blocking, without adding so much that the block is too soft (plaintiff's patent says the oil "is not necessary", E. 24, Col. 3, l. 33).

6. This court erred in finding as fact that with molasses blocks, daily consumption is relatively stable while the less palatable mineral and protein blocks show a relatively high rate of daily variation (Op. 7). This point was argued and rejected below, on the whole evidence.

Consumption of Staley's block is not relatively stable. Staley's patent itself (E 128, col. 2, l. 13, et seq.) admits a daily consumption range of from 5 ounces to a pound, or a 320% variation. And plaintiff's expert Bartley, on cross-examination, admitted that the Staley blocks them-

selves, with poloxalene, would vary in consumption rate by **more than 400%** or "higher than" a variation of one-quarter pound to one pound per animal per day (A. 447-9). Bartley's actual documentary test reports showed vast variations in daily consumption (E. 186, 187) much greater than his testimony indicated, which may explain the trial court's preference for Burns' testimony.

7. The Court erred in saying that the evidence proves that cattle develop a tolerance for salt which they like, which can lead to salt poisoning (Op. 7).

Staley repeatedly argued that because cattle will eat too much salt and die, no one would think of combining it with molasses. The Arizona article (E 47) and P. Ex. 44 (E 192) quickly demonstrate this is wrong. Salt poisoning occurs only when cattle are given insufficient water. How should an appellee deal with such fact issues on appeal?

8. This Court erred in the inference that wet molasses used as a binder caused blocking and storage problems.

There is no evidence that any ordinary blocker ever had any problems with using wet molasses in small proportions as a binder, as taught in the prior art. All evidence is contra. Surely the Court is not crediting Staley with limiting the amount of wet molasses for use as a binder in view of Svenska, Dupire, Arnold patents and others.

9. This Court erred in the inference that because Harvest Brand did not continue to make the 1958 blocks, these blocks were failures (Op. 7 and 8). This very argument was rejected below because contrary to fact.

The truth is that, in 1958, Central Feed and Supply Company supplied some dehydrated molasses to Harvest Brand and asked Harvest Brand to block it. Harvest Brand did so, and sent the blocks on to Central, a completely successful fulfillment of the request. That is ab-

solutely all there was to this episode. Staley has led this court to believe that this represented Harvest Brand's first attempt to block molasses, that it was a failure, and that Harvest Brand spent the next six years in an effort to block molasses. All of that is false. From 1958 to 1963 Harvest Brand was not "trying and failing"; it was doing **absolutely nothing** about molasses blocks, out of choice, because of economic conditions as explained to the trial court.

10. This Court erred in the inference that the prior art taught a 1% salt level in animal feed as an optimum amount for all purposes (Op. 8). This is a fact error by distortion of the record. It means that this amount will insure the recommended minimum daily dietary amount to the animals. This fact has in its true context nothing to do with another known fact, that large amounts of salt control consumption of animal feed blocks. These are two different things.

11. This Court erred in the inference that overeating the VyLactos Kattle Kandy blocks, because of absence of salt, was a critical problem that required careful limitation of the number of blocks made available to the cattle (Op. 8).

This testimony (which was taken by plaintiff, not by defendant), considered in its entirety as it was presented to the trial judge, shows that Kattle Kandy was not overeaten. Contrary to the statement in the Opinion, page 8, VyLactos' president did not admit the block was too palatable, as his testimony clearly shows. Kattle Kandy was not a failure for any reason connected with the case at bar.

12. The Court erred in saying that the VyLactos blocks did not hold up well in rain (Op. 8). This is **opposite** to what plaintiff's witness said. The record shows that only a very thin outer surface of the block softened when

wet. This is, and absolutely must be, true of all blocks, including Staley's (PX 38, E. 185). How else can it be gotten at by the cattle than for saliva to dissolve its outer surface?

13. This Court erred in saying that the combination of dehydrated molasses and salt alone has unexpected weather resistance (Op. 9). The evidence does not support this argument, which was made and rejected below. It is not true, and appellant's own witness admitted it is not true (A. 110). In fact, plaintiff's patent says the salt can be eliminated without losing "satisfactory weathering properties" (E 23, col. 2, l. 29).

14. This Court erred in saying that a Harvest Brand witness stated that since salt and molasses have different characteristics, one would expect problems in blocking them together, in that molasses needs high pressure and some water to block while salt needs low pressure and an absence of water to block (Op. 9).

This witness was Kviesitis of VyLactos (not Harvest Brand). He was called by plaintiff and not by defendant. The blocks he experimented with had 50-75% salt, much more than is used by plaintiff's patent. And he succeeded in making blocks (A. 497-8), and did not fail.

Staley's patentees had no difficulty in blocking their salt-molasses blocks, as they simply sent the mixture to an experienced blocker, who readily blocked it and returned the blocks to Staley. Harvest Brand's block makers found it quite easy to block the molasses-salt mixture, with time-honored techniques. Based on plaintiff's arguments, which are contrary to fact, this Court erroneously reversed the trial court, who was supported by the great weight of the evidence.

15. This Court erred in the inference that Harvest Brand had tried but had no success in making a molasses salt block before 1963 (Op. 9). This has been considered above.

There is not a shred of evidence that prior to 1963 Harvest Brand had tried to make a molasses-salt block but "had not been able to". It had not tried, nor had any need to do so, owing to economic conditions of dehydrated molasses at the time.

Conclusion

We submit that, if appellate courts are to reverse findings of fact, carefully spelled out by a trial court, based frequently on disputed evidence, sometimes based on expressed preference of one witness over another, some new guidelines must be presented to litigants **in advance**, and much more time and space must be given to the arguments and briefs.

If upset of findings, or an alleged absence of findings, is to be the basis for appellate disagreement with a trial court, a way must be found to have the result based on true facts, and not on the multitude of false representations of plaintiff's briefs. Indeed, it almost seems as if plaintiff deliberately deceived the court in an inordinate desire to win.

A rehearing should be granted, with adequate brief space and time to consider the findings of fact, and to demonstrate that as to them, the trial court was right and plaintiff's misrepresentations are wrong.

Respectfully submitted

ROGERS, EZELL, EILERS & ROBBINS
By EDMUND C. ROGERS
JOHN M. HOWELL
Suite 2162, 7733 Forsyth Blvd.
St. Louis, Missouri 63105

WHEELER & MITCHELSON
By FRED MITCHELSON
301 National Bank Building
Pittsburg, Kansas 66762
Attorneys for Defendant-Appellee

Certificate of Service

Service of the foregoing Petition for Rehearing; and Petition That Rehearing En Banc Be Granted served this 28th day of December, 1971, by mailing, airmail postage prepaid, five copies thereof to the offices of John W. Hofeldt, Haight, Simmons & Hofeldt, 141 West Jackson Boulevard, Chicago, Illinois 60604, Attorneys for Plaintiff-Appellant.

MARY C. WARD

APPENDIX H

Supplement to Petition for Rehearing

In the United States Court of Appeals
For the Tenth Circuit

A. E. Staley Manufacturing Company,
Plaintiff-Appellant,
v.
Harvest Brand, Inc.,
Defendant-Appellee.

Appeal No. 71-1049.

SUPPLEMENTAL LIST OF ERRONEOUS STATEMENTS IN PLAINTIFF'S BRIEFS

Space limitations prevent more than a listing of some statements from plaintiff's briefs that are categorically wrong, grossly exaggerated, or out of context. Little comment can be given other than the citation to the correct testimony.

Plaintiff's Main Brief

Misstatements or misleading statements in plaintiff's Main Brief on appeal include the following:

Page 3: "The combination of ingredients in a block somehow limits the daily consumption by the animal to a specified amount, and the rate of consumption is remarkably regular from day to day, and from animal to animal." "Vitamins and medicaments incorporated in the patented block are regularly consumed in prescribed dosages, eliminating the expensive and tedious job of animal-by-animal hand feeding by the farmer or the rancher."

False. Ex. 38 (E. 185) is a previously written record of Bartley's actual work, showing that Staley molasses-salt blocks varied in average consumption by a ratio of about 5:1. That article very clearly shows that "careful management of the blocks is mandatory," that block consumption was "affected by weather and managerial factors," that the blocks had difference in softness varying consumption rates, and that plaintiff's blocks were softer at certain times because of weather conditions.

Page 5: "The inherent and well recognized problems of molasses did not recommend it as a solution to the problem of administering drugs or medicaments to cattle." False. See prior Australian patent, 1956 (E. 76) and Vierling patent (E. 79) using self-fed phenothiazine. Also Vy-Lactos fed phenothiazine in loose molasses in 1956 (A. 516). The rest of this paragraph on page 5 relates to loose feeds, not blocks.

Page 6: "Prior attempts to solve each of these problems were legion." Sophistry. The cited patents relate to making molasses blocks without any evidence that any of those patentees tried to control the rate of consumption, or had any concern with phenothiazine. There is a careful disregard of the fact that protein blocks had already been successfully sold to feed controlled amounts of phenothiazine to cattle.

Page 7: "Another prior art failure was recalled on the witness stand by Otis Wells . . ." False. This was molasses dissolved in a barrel of water to which dry feed was added (A. 166). It is irrelevant.

Page 7: "Despite or because of these prior art teachings, Staley as well as three of its competitors were, in the period 1958-62, still investing time and money in seeking a solution." Actually the problem had already been solved by the Australian patent in 1956, (E. 76) and by the Arizona paper in 1951 (E. 47) and by Vierling (E.

79). Harvest Brand easily and successfully formed blocks for Central Grain in 1958, using Central's dehydrated molasses; did **nothing else at all** with molasses blocks until it built its own dehydrated molasses plant in 1963-4, and then quickly produced molasses blocks using salt as it had long used salt in protein blocks.

Page 7: "The Missouri Farmers Association had previously, in 1939, attempted to make a molasses block . . . Defendant's expert witness, who had been associated with this research, would not characterize it as successful . . . (A. 403)." Misleading. The matter came up only in passing, the witness remarking that he had cast blocks in his laboratory in 1939. It was no more than that. The trial court recognized this and properly evaluated it. To say that the witness "would not characterize it as successful" implies that it was unsuccessful, which is totally untrue (A. 402-3).

Page 8: Re VyLactos: Kattle Kandy was not a failure. It was a protein-molasses block. Molasses blocks are used at one time of year, and protein blocks at another, and it was not successful to combine them (A. 502). But the block was **successful** as to rate of consumption and as to weathering, despite plaintiff's present false statements to the contrary. And if VyLactos dropped Kattle Kandy after a couple of years, it also dropped the molasses salt block after a couple more years (Kviesitis, Dep. 151).

Page 8: Re Harvest Brand: Plaintiff falsely states that "Harvest Brand, in 1959, made a block of dehydrated molasses," that "turned out to be very dry and crumbly," that the "addition of wet molasses did not help", and that a "hundred of these blocks were shipped to the customer." This is a mass of untruth. The truth: Only the intial block was dry and crumbly. Napier, using his blocking experience, immediately added wet molasses as a binder. That made it work. The hundred were made with

wet molasses, and were successfully shipped out (A. 238, et seq.).

Page 8: The last paragraph is immaterial, because molasses blocks had already been made with phenothiazine.

Page 9: "It was found that not only would the cattle eat from the block each day, they did not overeat, a surprising result in view of the palatability of both of the main constituents." There is no evidence to indicate that anyone was surprised, since the salt control idea was confessedly taken over by Staley from protein-salt blocks (See E. 67, col. 2).

Page 11: "In a period between 1958 and 1963, four competing companies in the livestock feed industry were actively pursuing research to develop a means to overcome the problems inherent in the handling and feeding of molasses." "Three of these companies were unable to solve the problem; they tried and failed." False. This false proposition appears repeatedly throughout plaintiff's brief. See above.

Pages 11-12: As to the section numbered 1, the fact that no findings were made as to alleged failures of competitors came about because the proposition is not true. In addition, there was direct evidence before the trial court that the level of skill in this art, as to the formulas for making blocks, is the high level of graduate degrees or an equivalent in long experience, and the evidence was not challenged. The premise of the man of skill in the art requires him to have **all** the prior art before him. Otherwise, ignorance can reward the obvious with patents.

Page 12: Paragraph 2 is false. The prior art was operative, clearly predicted the objectives of the Staley patent, and taught how they could be achieved. Saying that there was an unexpected result in the Staley patent is wrong and contrary to the facts found below.

Page 13: "No finding of fact was made regarding the novelty or obviousness of the combination as a whole." This is contrary to the facts. In the first place, the Court said there was no true combination but only an aggregation of the elements, each acting in its old manner. And see Findings 33, 34, 38, 45.

Page 15: "No finding made by the court even purports to satisfy any of the conditions of Section 102." False. Findings 55 and 56 say claims 10 and 11 are anticipated. Defendant did not argue that other claims were invalid under Section 102, but rather under 103.

Page 15: "There is not the barest suggestion that anyone ever combined molasses and salt in significant quantities or had ever used molasses and salt together in a livestock feed—in any form at any time anywhere." False. VyLactos sold a bagged product in September, 1956, containing phenothiazine and dehydrated molasses at least 50% molasses equivalent (A. 516). Defendant's Ex. M, (E. 53) shows that cubes (blocks) containing 25% salt mixed with cottonseed, alfalfa, molasses, bone meal, calcium carbonate, and mineral salts were used in Arizona in 1951. Plaintiff's patent says "Proteins, minerals, vitamins and other" supplements may be added to the patented block (E. 24, col. 3, l. 43).

Pages 17-18: Plaintiff says "the evidence establishes that in the late 1950's and continuing up to 1962 . . . feed nutritionists . . . at Harvest Brand . . . at Missouri Farmers Association . . . and at VyLactos Laboratories were stymied by the problem of providing a molasses product which was weatherable and capable of self-feeding, as well as an acceptable means for the self-administration of medicaments in the pasture or on the range . . . In their work, they investigated various schemes shown in the prior art and improvised on them, but were unable

to suggest or provide a solution. They tried. They tested. They tried again—and they failed." False. See above.

Page 18: The first paragraph re "Missouri Farmers Association" is false. See above and note repetition of this falsity.

Page 19: After the Staley blocks came on the market, "MFA went back to the drawing boards", dropping its attempts at making suitable fly and worm control products from a mineral block, and "the blocks of the Staley patent were adopted." False. MFA's formula originated with MFA, and there is no evidence that it came from the Staley block (A. 214).

Page 19: "The blocks of the Staley patent were adopted (A. 207-9). As Holst put it '. . . we chose to go this route' (A. 214)" meaning that Holst admitted that MFA copied Staley's patent. An outrageous and inevitably deliberate misstatement. Holst's statement (A. 214) was "As I recall, Dr. Johnson thought that we should hide the flavor of the phenothiazine and we felt molasses would be the good way to do it. Since dried molasses was available, we chose to go this route." Combining phenothiazine with dried molasses was certainly not the Staley patent. It was the earlier Australian patent.

Page 19: As to VyLactos: Plaintiff's brief said Kviesitis appreciated the molasses block as early as 1953" and that others at VyLactos had encouraged him to develop such a product." There is no evidence that anyone at VyLactos cared about molasses blocks until 1962.

Page 19: Says VyLactos' product came several months after Staley's block came on the market. The implication is false. Development of Kattle Kandy began at the end of 1961, its formula was finished in the summer of 1962, and Kattle Kandy was shipped and invoiced at least

as early as October 26, 1962 (E. 148). Staley's first shipment was not until in September, 1962 (A. 32).

Page 20: "As Kviesitis himself acknowledged (A. 494-495), the block would not weather properly," and that no matter how hard the blocks were made, rain, heat and humidity would cause the product to soften at the surface where consumption takes place. Totally false. Read A. 494-5. Kattle Kandy behaved exactly like Staley's blocks (A. 439-440).

Pages 20-21: "By the first part of 1964, VyLactos had purchased and analyzed a patented Staley Sweetlix block (A. 499-500; E. 164), and in June of that year, announced its new 'Scotch Block A' (A. 497; E. 157, 159-163)." False. VyLactos formulated its Scotch Block February 27, 1964; did not get a Staley block until March 12.

Page 21: VyLactos failed in the attempt to follow the route charted by the prior art. False. Kattle Kandy blocks were not a failure with respect to anything involved in the present lawsuit.

Page 21: "The prior art actually led VyLactos astray as it had MFA and Mr. Burns." False. None of the three was led astray.

Page 21: Implying that a 1% salt limit was taught by the art. False. Prior art taught up to 33% salt to control consumption of protein-molasses blocks. See the Arizona paper (E. 47).

Page 21: That VyLactos was dubious of the concept of combining salt and molasses in a block in 1963. False. VyLactos quickly succeeded in making blocks containing 50-75% salt, the remainder molasses.

Page 22: First paragraph: Plaintiff's outburst with respect to what might have been known by VyLactos. False. See above.

Page 22: The Harvest Brand story is again reprehensibly misrepresented. See above. Note that on page 8 plaintiff said that addition of wet molasses did not help, but on page 22 admits that the wet molasses addition was successful.

Page 23: Plaintiff writes that Harvest Brand in December, 1963, had to confess its inability to "meet the demand of its customers" for a high level molasses block. Harvest Brand had not had a dehydrated molasses plant operating prior to 1964.

Page 23: It says that when Harvest Brand offered a block, it did not use the prior art. False. Prior art taught salt to control the block's consumption—liquid molasses to bind it, fat to make it weather and easy to mold, and to incorporate phenothiazine in it. As to phenothiazine, plaintiff's brief is equally overdrawn. It says that levels of phenothiazine to eradicate hornflies "were thought to be totally impractical in a program of self administration."* False. The Australian patent of 1956 taught that phenothiazine could be masked in a molasses block. Vierling patent (E. 81, col. 4, l. 45) teaches use of molasses to mask phenothiazine for self-feeding of therapeutic dosage. Harvest Brand's prior art protein-phenothiazine block (A. 228-9, E. 13-16, Ex. F) still is being sold, with an amount of phenothiazine substantially at the range set by plaintiff's patent (A. 219),** and a consumption rate higher than plaintiff's patent proposes.

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* Phenothiazine to control hornflies received government approval only in 1962 (A. 423). Then its manufacturer, Interstate Chemical, actively solicited all feed manufacturers. Plaintiff got its ideas from Interstate.

** It makes no difference whether Harvest Brand, or anyone else, recognized and adopted, or overlooked, the teaching of the Australian patent, or other prior art. The teaching was there, and bars plaintiff from re-patenting molasses blocks with phenothiazine.

Page 27: "MFA and Harvest Brand were independently and desperately struggling to find a means to administer phenothiazine." False. VyLactos had a phenothiazine-molasses block on the market a year ahead of Staley, and the Australian patent antedated both. The District Court made no effort to reconcile its conclusion of obviousness with "these facts," because: one, they are not true; two, since the Autralian patent, and VyLactos' own 1956 molasses and phenothiazine preceded these efforts, it is legally immaterial whether or not latecomers failed to find the earlier work and put it to use.

Page 29: "Protein and mineral blocks" for administering phenothiazine were total failures". False. Protein blocks with phenothiazine are still being sold successfully.

Page 29: "Skilled nutritionists and researchers at Harvest Brand and VyLactos as late as 1962 could not make it work", i.e., using wet molasses to bind dehydrated molasses. False. Napier quickly did make it work (A. 239, 241-2) just as the prior art taught. There is no evidence whatever that VyLactos tried the wet molasses binder and could not make it work.

Page 31: The Chalkley patent cannot discourage blocking molasses, which had been successfully done many years before. Chalkley only taught how to package a particular molasses product.

Page 32: "* * * When Harvest Brand tested weatherability . . . 'those blocks melted into the ground (A. 267)." Staley's counsel is bound to know that the reason they did so was that, in an accelerated test, the sprinkler is left on the blocks until they do melt down, and the time required is a measure of the hardness of the block. Plaintiff's counsel knew this because when he took Napier's deposition, Napier explained that operation. (Nap. Dep. 18, 24). Any block, including Staley's, undergoing the same test, would melt into the ground.

Page 32: "Defendant's expert Burns would not, and did not think to incorporate high levels of salt" in a molasses block because "Almost invariably it would reduce the weatherability." False. There was no connection in context between Burns' statement and what he would or did think to do with respect to including salt in a molasses block. (See A. 345.)

Page 32: Staley argues that because of the Gehrt patent (not of record on appeal), one skilled in the art would be deterred from using it in a dehydrated molasses salt block. False. Wet molasses was the standard binder, as even plaintiff's own witness admitted (A. 141).

Page 32: "One of the last things to occur to him would have been to compound the weathering problem by adding salt." False, an unsupported statement of counsel. Salt melts in protein blocks, in mineral blocks, in salt blocks, but those facts have not deterred its use in blocks.

Page 33: "Prior to the invention of the Staley patent, no one had ever combined high levels of sal and molasses **in any feed.**" False. The Arizona publication had 33.3% salt combined with molasses and cubed (E. 53, table 1).

Page 33: Staley says that a reader of cited publications would conclude that salt is "highly palatable and may be over-consumed" to the point of consumption resulting in abnormally high intake and occasional salt poisoning, citing E. 196. That is false. The feed there was cottonseed meal plus salt, the former being the lure. Also insufficient access to water was provided. There is no evidence that salt as such is overconsumed because of palatability.

Page 33: "Progressively increased proportions of salt were required . . . to achive any control . . . large variations occurred." Whatever variations were present in the prior art were also present in the Staley block. Staley's own expert Bartley admitted a variation of over 400%. (See charts E. 183, and E. 185 seq.)

Plaintiff's Reply Brief

Pages 1-2: Restatement of false propositions of main brief. Still false.

Page 2: "Direct evidence of skill in the art is available." False as to what plaintiff refers to. The person of ordinary skill (35 USC 103) is a person of a certain range of knowledge of the art—here usually with a graduate degree, according to the direct evidence. Plaintiff's proposition is that if any persons do not come up with the answer, that is proof of non-obviousness—even though they may not have had all the prior art before them, or may have preferred a different approach, or may not have put adequate people onto the job. That is a false and dangerous proposition.

Pages 3-4: Reiterating the false story re Burns making blocks. Also adds the false filip that he added a "chemical" to solidify the molasses. The whole section is shot through with falsity, now repeated again.

Page 5: More repetition of the false story of what happened with Central Grain.

Page 6: "Harvest Brand asserts . . ." False. Harvest Brand did not fail to come up with a successful means to administer drugs.

Page 6: The "Australian patent" does not disclose "a dehydrated molasses block." False. That patent (E. 76) heats molasses with tallow until water is removed (dehydrating).

Page 6: False statement that Burns judged a cast block made by him or by the Australian patent unworthy of weathering or feeding tests. Further he later said that he would expect the block to hold its shape at room temperatures.

Pages 6-7: The proposition quoted from defendant's brief stated the true law, prior to the present decision, and according to a multitude of prior decisions. The so-called person of skill in the art **must be** supplied with **all** the prior art.

Page 8: "The fact is that the MFA nutritionist had acquired a recent knowledge . . ." False. Totally unproved and it was plaintiff's job to prove it if true.

Page 8: VyLactos got knowledge from Staley. False. Again they were plaintiff's witnesses and if what plaintiff says had been true, plaintiff should have put in the evidence.

Page 8: Last paragraph is a crude distortion of what defendant wrote. We said that testing a 50-75% salt block was not a copying of Staley, and we still say so. Plaintiff had used the episode in a false contention that it showed VyLactos doubtful about salt-molasses blocks.

Page 9: That Harvest Brand goes "outside the record," in "repeatedly asserting that the prior art discloses 'high level dehydrated molasses blocks' (Harvest Brand's Br. pp. 6, 11, 17, 19, 21) and even that 'high level molasses and salt blocks' were old (Harvest Brand Br. p. 42)." The first quote is of the record and the findings. The **second quote is totally false**, and did not appear in our brief.

Page 9: "There is but one reference in the prior art to a molasses block . . .", namely, the Australian patent. False. Patents to Dupire (E. 27), Boyd (E. 29), Hughes (E. 31), and deTornya (E. 33), Svenska (E. 34), and Arnold (E. 85) all describe dehydrated molasses blocks. That they are sometimes called cakes or briquettes is not substance. Plaintiff's patent says (E. 23, col. 2, l. 4) they "can be any suitable size or shape." Plaintiff's patentee

Wright also said so (A. 540) and that it can be called a block or a cake or a briquette or a tablet (A. 547-8). The trial court so found (Fdg. 29, 30, A. 40). Plaintiff's lawyer is playing semantics, but contrary to his patentee.

Respectfully submitted,

ROGERS, EZELL, EILERS & ROBBINS
By EDMUND C. ROGERS
JOHN M. HOWELL
Suite 2162, 733 Forsyth Blvd.
St. Louis, Missouri 63105

WHEELER & MITCHELSON
By FRED MITCHELSON
301 National Bank Building
Pittsburg, Kansas 66762

Attorneys for Defendant-Appellee

APPENDIX I

Order Denying Rehearing

January Term—February 4, 1972

Before Hon. John C. Pickett, Hon. Delmas C. Hill and Hon. James E. Barrett, Circuit Judges.

A. E. Staley Manufacturing Company, a Corporation of the State of Delaware,

Appellant;

v.

Harvest Brand, Inc.,

Appellee.

No. 71-1049.

Upon consideration of appellee's Petition for Rehearing, it is ordered that said petition be and is denied.

APPENDIX J

Order Denying Rehearing En Banc

January Term—February 4, 1972

Before Hon. David P. Lewis, Chief Judge; and Hon. Delmas C. Hill, Hon. Oliver Seth, Hon. William J. Holloway, Jr., Hon. Robert H. Williams, Hon. James E. Barret, and Hon. William E. Doyle, Circuit Judges.

A. E. Staley Manufacturing Company, a Corporation of the State of Delaware,
Appellant,

v.

Harvest Brand, Inc.,
Appellee.

No. 71-1049.

The Petition for Rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel or judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure), the request for Rehearing En Banc is denied.

FILED
MAY 15

In the

Supreme Court of the United States

No. 71-1434

HARVEST BRAND, INC., (Now by Substitution HARVEST INDUSTRIES, INC.),

Petitioner,

vs.

A. E. STALEY MANUFACTURING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Tenth Circuit

EDWARD A. HAIGHT
Suite 2820
141 West Jackson Boulevard
Chicago, Illinois 60604
Tel. No. (312) 922-4941
Attorney for Respondent

Of Counsel:
JOHN W. HOFELDT
BRITTON A. DAVIS
HAIGHT, HOFELDT & DAVIS
Suite 2820
141 West Jackson Boulevard
Chicago, Illinois 60604
Tel. No. (312) 922-4941

CHARLES J. MEYERSON
A. E. STALEY MANUFACTURING COMPANY
P. O. Box 3335
Decatur, Illinois 62525
Tel. No. (217) 423-4411

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This patent infringement action does not give rise to the Question Presented by the Petition. In reversing the District Court, the Court of Appeals did not, "abruptly" or otherwise, reverse findings of fact, the charge (Pet. p. 2) on which the Question of the Petition is based. Nor, did the Court of Appeals disregard the findings, "cavalierly" or otherwise, as asserted (Pet. p. 7) in connection with the Reasons For Granting The Writ.

Rather, reversal was required because, as stated in the opinion of the Court of Appeals (A-27):

> "***the District Court erred in its conclusion that the Staley patent lacked novelty and non-obviousness."

These legal errors are totally ignored by the Petition. Instead the Petition advances, as Reasons For Granting The Writ, two propositions which have no substance.

The first is that the 1968 appellate rules impose limitations on length of briefs and oral arguments which compel an appellee to choose "between, on the one hand, supporting the findings of fact of the trial court, and, on the other hand demonstrating the error in the multitude of statements in the appellant's brief" (Pet. p. 6).

Not so. What confronted Petitioner in the Court of Appeals was the impossible task, as later shown, of defending findings of fact which were irrelevant to the issues because they were based on misconceptions of the law and which were contrary to uncontroverted evidence which compelled conclusions opposite to those arrived at by the District Court.

Moreover, Petitioner was not deprived of the opportunity by the appellate rules or otherwise of demonstrating, if it could, what it considered to be "errors in the multitude of facts" in Respondent's briefs to the Court of Appeals. Much of Petitioner's brief to that Court was directed to factual matters. Moreover, Petitioner devoted 7 pages of its Petition For Rehearing to the Court of Appeals to factual assertions under the heading "The 'Facts' Relied Upon By This Court's Opinion Are In Error And Untrue" (A-38 to A-44) and, pursuant to leave granted by that Court (A-33), filed a 13 page "Supplemental List of Erroneous Statements in Plaintiff's Briefs" (A-46 ot A-58) challenging as untrue, and worse,

56 statements contained in Respondent's brief. The Court of Appeals which was "persuaded, on the entire evidence, that a mistake has been committed" (A-27), denied the petition. Petitioner had more than its day in Court. Considered in the best possible light, Petitioner's argument in this regard is simply that had it known at the time its brief was written what the decision of the Court was going to be, it would have moved the Court for leave to file a longer brief—as the rules of procedure permit.

The second or "corollary" reason advanced by the Petition is an alleged need for instruction from this Court to lower courts that an admission of novelty is not an admission of patentability (Pet. pp. 11-12). The Petition does not assert that either of the lower courts in this case require such instruction and for good reason. The trial court ignored Petitioner's admission that Respondent's patent was novel and held to the contrary because of a misconception of the law governing that issue. While the Court of Appeals agreed with Petitioner on the novelty of Respondent's patent, it did so not on the basis of the admission—which is not mentioned—but because "The great weight of the evidence does not support the (District) Court's conclusion on the issue of novelty." (A-21)

The conclusions of the District Court on the novelty and non-obviousness issues were founded on basically one error of law. In the view of the District Court, it is the elements of a combination patent considered separately rather than the combination as a whole which is to be judged for novelty and for obviousness. This approach clearly appears from the findings of the trial court that each of the separate elements or ingredients of the patented blocks were separately old in the prior art, and from the absence of any findings directed to the whole of such combination.

The absence of relevant findings by the District Court to the novelty issue as correctly defined by the law was twice noted by the Court of Appeals—"The lower court made no findings of fact which would negate the claim of novelty" (A-20), and "There were no findings of fact concerning anticipation or aggregation ***". (A-21).

The Petition itself establishes the error of the District Court and the correctness of the holding of the Court of Appeals on the novelty issue. Petitioner states (Pet. p. 11) that it "forthrightly asserted to the courts below" that there were differences between the subject matter of Respondent's patent claims and the prior art. The Court of Appeals so held, noting that "The great weight of the evidence does not support the Court's conclusion on the issue of novelty" (A-21).

The District Court's error of law on the novelty issue necessarily led it into further error on the issue of obviousness. Having erroneously concluded that the prior art disclosed the subject matter of the claims of Respondent's patent, the District Court found no "differences between the prior art and the claims at issue." Accordingly, the differences which in fact exist, and which are conceded by Petitioner to exist, between the prior art and the subject matter of Respondent's claims were never judged for non-obviousness as commanded by *Graham* v. *Deere*, 1966, 383 U. S. 1.

For the same reason, the District Court ignored the evidence, most of it uncontroverted, which establishes:

> That at the time the invention of Respondent's patent was made, men skilled in the art and employed at competing companies in the industry had repeatedly tried but were unable to achieve the objects of the invention;

That the prior products and methods, when used in commerce, had proven to be inoperable to achieve the objects of the invention and, indeed, had deterred investigation of utilizing essential elements of Respondent's patent to solve the problems; and,

That, the combination of elements of the claims of Respondent's patent achieve new and surprising results.

Respondent's patented combination includes high levels of salt and high levels of molasses formed into a block. For example, the patent discloses a combination of 70% dehydrated molasses, 20% salt, 2% animal fat and trace minerals, and an additional 8% molasses in its wet form to act as a binder for the other ingredients. This combination formed a weather-resistant block which not only can be self-fed on the open range, but which results in a high degree of consumption control, making it useful as a carrier for medicaments (drugs) required to be taken by the animals at a steady, regulated dosage.

This combination is undeniably new: The basic concept of combining substantial amounts of molasses (highly palatable and weather unstable) with substantial amounts of salt (highly palatable and weather unstable) in a livestock feed is antithetical to the prior art. It is not shown anywhere.

The results achieved by this combination are also new. Livestock are attracted to, and regularly eat from, the block. At the same time, the combination of ingredients in the block somehow limits the day-to-day consumption by the animal to a limited amount. For these reasons, the rate of consumption is remarkably regular from day to day, and from animal to animal. The dual result—attraction to insure some consumption each day by each

animal, yet uniform regulation of the amount consumed—enables the rancher to self-feed the block to provide each animal in the herd with its daily supply of molasses. Prescribed dosages of vitamins and medicaments incorporated in the patented block are regularly consumed, eliminating the expensive and tedious job of animal-by-animal hand feeding or dosing every day by the farmer or the rancher.

The value of molasses in the feeding of animals is well known. Carbohydrates in the form of sugars in molasses are utilized as sources of energy by animals. Cattle derive an even more important benefit from molasses. They, along with other ruminants such as sheep and goats, have specialized digestive systems which contain a vast population of bacteria and protozoa which produce enzymes, enabling the animal to digest roughage. Roughage, because of its high fiber content, is otherwise indigestible or, at best, very difficult to digest. In general terms, molasses provides the bacteria with energy, and they in turn produce the enzymes necessary to enable cattle to utilize roughage as their principal feed ingredient. With over half the land in the continental United States producing only roughage, its proper utilization is vital.

Molasses is beneficial only if not over-consumed. It has a laxative effect, causing "scours" or diarrhea in the animals. Also, when in excess, the acids produced tend to suppress the bacteria population and thereby interfere with roughage digestion. Thus, maximum nutritional benefit from roughage is obtained only by feeding molasses in controlled amounts.

The opinion of the Court of Appeals reflects uncontroverted evidence in its statement that the product of Respondent's patent (A-20):

". . . is a highly palatable feed block for cattle or sheep from which they will eat a surprisingly consistent amount each day. Two novel benefits are derived from this regulated consumption. First, although molasses is very beneficial to cattle, too large an intake can cause scouring or diarrhea. This problem has been eliminated in the Staley patent block. Second, because cattle like the taste of molasses, unpalatable medicines can be added to the Staley block and cattle will consume them in a controlled amount. The Staley patent feed block thus accomplishes two new and novel results."

Included in such evidence is that which establishes the patented feed block as the sole known effective medium for the self-administration to livestock of the "bloat" preventive medicament, poloxalene. Bloat result when fermentation gasses build up and are trapped in the rumen of the animal. The resulting pressure on the lungs can cause suffocation and death to the animal. The cost of losses due to bloat was over 100 million dollars annually. To be effective in preventing bloat, poloxalene must be administered at a prescribed rate during *every* twelve hour period to *each* animal. The patented blocks, with their regular and uniform consumption, have proven to be the only practical way to have cattle take their own medicine in a regulated way without individual dose-by-dose administration.

Similarly, with respect to the self-administration to livestock of phenothiazine, a worming agent and preventative of horn flies and face flies: though it is highly distasteful, it too must be consumed in regulated doses, and on a regular basis, to be effective. Flies and worms also result in heavy animal livestock losses. Even though phenothiazine had been known as a fly control agent for over 25

years, "there wasn't a practical way to feed it" until the advent of the patented block (R. 188).*

A further error of the District Court was its failure to make findings on or give heed to the evidence showing the failures and inabilities of the prior art to meet the objectives and accomplish the results of Respondent's patented product. See *United States* v. *Adams*, 1966, 383 U. S. 39 at 50-51. Such deficiencies in the trial court's findings were noted by the Court of Appeals as follows (A-22):

> "... The Court did not, however, make any findings dictated by the great weight of the evidence in the record reflecting the failures and drawbacks of the prior art in accomplishing the novel result achieved through the Staley patent. Each of the prior arts above referred to were wrought with practical limitations * * *"

Also ignored by the District Court was the evidence establishing that the inoperative prior art relied upon by Petitioner actually deterred investigation of the direction taken by the patentees of Respondent's patent. The Court of appeals (A-25) agreed with this Court on the signifi-

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* In a rather transparent effort to impart an emotional appeal to its assertions, Petitioner suggests (Pet. pp. 2, 10) that the price of meat will be inflated due to the patent. Not only is this suggestion wholly unwarranted on the record of this litigation, it directly contradicts undisputed evidence that the patented blocks result in greater utilization of range and pasture land, promote an annual savings of millions of dollars a year from livestock which would otherwise be lost through bloat or fly/worm infestation, and generally permit an increased efficiency in livestock operations with an attendant savings in cost and rise in production.

cance of such evidence. See *United States* v. *Adams*, supra at 51-52.*

The Petition makes no attempt to defend the errors and omissions of the District Court which are pointed out in the opinion of the Court of Appeals. Rather, Petitioner seeks to obscure such errors behind a plea of inviolability of fact findings; notwithstanding that in the instant case such findings were immaterial to the issues involved and the direct result of the errors of law committed in the District Court.

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* One highly-qualified nutritionist associated with a competing block maker conceded that his company had—for over a year after the patented blocks came on the market—failed to offer the high level salt-molasses combination because only 1% salt was the general recommendation of "textbooks on nutrition and feeding" (R. 502). Petitioner's expert would not have thought to incorporate high levels of salt in a block which was to include molasses because "almost invariably it would reduce the weatherability." (R. 345).

Since this case does not present the Question advanced by the Petition and the Reasons asserted for granting the Writ are devoid of merit, the Petition should be denied.

Respectfully submitted,

EDWARD A. HAIGHT
Suite 2820
141 West Jackson Boulevard
Chicago, Illinois 60604
Tel. No. (312) 922-4941
Attorney for Respondent

Of Counsel:
JOHN W. HOFELDT
BRITTON A. DAVIS
HAIGHT, HOFELDT & DAVIS
Suite 2820
141 West Jackson Boulevard
Chicago, Illinois 60604
Tel. No. (312) 922-4941

CHARLES J. MEYERSON
A. E. STALEY MANUFACTURING COMPANY
P. O. Box 3333
Decatur, Illinois 62525
Tel. No. (217) 423-4411